Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1994

STATE OF FLORIDA and LAWTON CHILES, Governor,
Cross-Petitioners

v.

SEMINOLE TRIBE OF FLORIDA,
Cross-Respondents

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the Court should have engaged in comment affecting the duties and responsibilities of the parties in part V of the opinion after holding that there was no subject matter jurisdiction?

Whether the remedy created by the Court in part V of its opinion can be found within IGRA and whether it is consistent with the intent of Congress in the passage of IGRA?

Whether the Court below improperly engaged in severability analysis creating a new remedy for the Tribe, where the court merely addressed the validity of a jurisdictional bar to the instant suit?

PARTIES

The caption contains the names of all parties to this action in the court below in the captioned case.

Parties in the case consolidated on appeal with this case in the Eleventh Circuit were:

Poarch Creek Indians and Poarch Band of Creek Indians,
Plaintiffs/Appellants

State of Alabama and James E. Folsom, Governor,
Defendants/Appellees.

Amici curiae in the Eleventh Circuit were:

National Indian Gaming Association

The Tunica Biloxi Tribe

The States of:

California	Nevada
Connecticut	Oklahoma
Kansas	South Dakota
Mississippi	Washington
Montana	Wyoming
Nebraska	

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OPINIONS BELOW

The opinion and judgment of the Eleventh Circuit is reported as *Seminole Tribe of Florida v. State of Florida, et al.*, and *Poarch Creek Indians v. State of Alabama, et al,* 11 F. 3d 1016 (11th Cir. 1994) and is submitted as appendix A.

The opinion of the District Court in this case is found at *Seminole Tribe of Florida v. State of Florida, et al.*, 801 F.Supp. 655 (S.D. Fla. 1992) and is submitted as appendix B.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit, review of which is sought here, was entered on January 18, 1994. On April 6, 1994, the Eleventh Circuit entered an order denying timely motions for rehearing and suggestions for rehearing *en banc*. By order of April 28, 1994, the mandate was stayed.

Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) and Rule 12.3 of the Rules of the Supreme Court. The date of receipt of the Petition for *Certiorari* in connection with which this cross-petition is filed was July 1, 1994, docket number 94-12.

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, Eleventh Amendment states:

> The judicial power of the United States shall not be construed to extent to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Relevant portions of 25 U.S.C. § 2701, *et seq*, are set forth in the appendix, separately bound, at Appendix F.

STATEMENT UNDER RULE 29.4(b)

Since the constitutionality of the Indian Gaming Regulatory Act, an act of Congress affecting the public interest, may be drawn into question, 28 U.S.C. § 2403(a) may be applicable and this document will be served on the Solicitor General.

The Court of Appeals certified to the Attorney General that the constitutionality of an act of Congress might be drawn into question and the Attorney General declined to appear below.

STATEMENT OF THE CASE

NATURE OF THE CONTROVERSY

The Indian Gaming Regulatory Act (IGRA) establishes a comprehensive statutory scheme for the regulation of gambling on Indian lands. 25 U.S.C. § 2701 *et seq.* and 18 U.S.C. § 1166-68. It is the result of years of legislative debate and prior judicial decisions. S.Rep. 100-446, 100th Cong., 1st Sess. 1-5, 1988 U.S.C.C.A.N. 3071-3076.

Under IGRA, Congress created three categories of gambling. The issues before this Court relate to class III gambling, which includes all forms of gambling other than traditional Indian social games and bingo. 25 U.S.C. § 2703(8). Class III gambling is lawful only in a state which permits such gambling for any purpose, by any person, entity or organization. 25 U.S.C. § 2710(d)(1)(B).

A Tribe desiring to conduct class III gambling must request the State in which the Indian lands are located to negotiate a Tribal-State compact governing such gambling. The State, pursuant to IGRA, must negotiate in good faith with the Tribe. 25 U.S.C. § 2710(d)(3)(A).

If the State fails to negotiate or fails to negotiate in good faith, the IGRA provides that a Tribe can initiate a suit in federal district court. 25 U.S.C.§ 2710(d)(7)(A)(i)

If the court finds that the state has not acted in good faith, then the court will direct the state and the Tribe to conclude a compact within 60 days. 25 U.S.C. § 2710(d)(7)(B)(iii) If a compact is not completed within that time, the court can then appoint a mediator. 25 U.S.C. § 2710(d)(7)(B)(iv) The State and the Tribe are directed to propose their last best offer and the mediator is required to select the one of the two submitted compacts which best comports with the IGRA, other applicable federal law, and the findings and order of the court. *Id.*

The State and the Tribe then have 60 days to agree to the selected compact. 25 U.S.C. § 2710(d)(7)(B)(v)-(vii) If the parties still cannot agree to execute a compact within that time, then the mediator transmits the selected compact to the Secretary of the Interior. Only at this point is the Secretary empowered to prescribe regulations for the implementation of class III gambling consistent with the terms of the chosen compact, IGRA, and State law. 25 U.S.C. § 2710(d)(7)(B)(vii)

After finding that the States could validly interpose a defense of the Eleventh Amendment to a suit by a Tribe under 25 U.S.C. § 2710(d), the Circuit Court below went on to discuss the effect of its ruling and fashion a remedy for the Tribes that is not otherwise found in the IGRA and which is contrary to the clear intention of Congress for State participation. This discussion violates the dictates of precedents of this Court and implicates important issues regarding gambling on Indian Reservations governed by the processes in IGRA.

COURSE OF PROCEEDINGS AND DISPOSITION OF CASE

On September 19, 1991, Plaintiff, Seminole Tribe filed its complaint in the District Court alleging that the State of Florida had failed to negotiate in good faith for the completion of a Tribal-State compact for gambling operations pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, *et seq.* [Vol. 1, Doc. 1] The State defendants moved to dismiss the case based on the immunity afforded in the Eleventh Amendment on December 16, 1991. [Vol. 1, Doc. 14] Oral argument was heard by the Court on January 13, 1992 and the Court issued its order denying the motion on June 18, 1992. [Vol. 2, Doc. 46] A timely notice of appeal was filed July 9, 1992. [Vol. 2, Doc.47]

By motion dated August 22, 1992, Plaintiff Tribe moved to consolidate this case with *Poarch Band of Creek Indians v. Alabama,* case no. 92-6244 and that motion was granted by order dated October 1, 1992.

Briefs were filed by all parties in November and December, 1992 and oral argument was held before the Court on January 4, 1993. By opinion dated January 18, 1994, the 11th Circuit Court of Appeals reversed the lower Court's denial of Florida's motion, remanding with instructions to dismiss the case, and affirmed the Alabama District Court's dismissal of the Poarch Band case. The Appeals Court held that the Eleventh Amendment immunity of the States could not be abrogated by Congress pursuant to its authority under the Indian Commerce Clause, Art. I, § 8, cl. 3, U.S. Const., and that none of the established exceptions to the State's Eleventh Amendment Immunity were applicable. Therefore, the Court found that it lacked subject matter jurisdiction.

During the pendency of the appeal in the *Seminole* case, the State of Florida and the Seminole Tribe agreed to proceed with cross-motions for summary judgment on the merits in the Court below. After extensive briefing and oral argument, the District Court issued an order and opinion defining the proper scope of negotiations for Florida and the Seminole Tribe. The Court below also specifically found that Florida had not violated IGRA because it had negotiated in good faith for the completion of a compact with the Seminoles.[1]

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1 That case is currently on appeal to the 11th Circuit, docket number 93-5256. That case has been abated pending the outcome of the Seminole Tribe's Petition for *Certiorari* to this Court, docket number 94-12. A copy of the district court's final order on summary judgment is provided in appendix E.

REASONS FOR GRANTING *CERTIORARI*

This Court should exercise its powers of supervision over the 11th Circuit because that court ignored binding precedent and went forward with the creation of a remedy for the Tribes in the face of an assertion of a valid 11th Amendment defense after holding that the case should be dismissed for lack of subject matter jurisdiction.

The addition of part V of the lower court's opinion created a split among the circuits on the issue of remedies. The 8th Circuit made no comment. *See Cheyenne River Sioux Tribe v. South Dakota,* 3 F. 3d 273 (8th Cir. 1993). The court below in this case created a remedy for a tribe faced with a state which asserts its 11th Amendment immunity and the 9th circuit stated that the remedy created by the 11th circuit "pervert[s] the Congressional plan." *Spokane Tribe of Indians v. Washington State,* ___ F. 3d ___, 1994 WL 316443, *6 (9th Cir. 1994).

Finally, the remedy provided by the court below is not found in the statute and is inconsistent with the intent of Congress which involved the careful balancing of the interests of the Federal, State, and Indian governments. The 11th Circuit's attempt to legislate a new remedy is inappropriate and it should be left to Congress to reevaluate the balance of interests and purposes of this act in fashioning a new remedy, if one is needed.

WHEN A COURT DISMISSES A CASE FOR LACK OF SUBJECT MATTER JURISDICTION IT IS INAPPROPRIATE TO MAKE SUBSTANTIVE DECISIONS CONCERNING THE RIGHTS AND RESPONSIBILITIES OF THE PARTIES

The Court below determined that:

> the States retain their sovereign immunity and the federal Courts do not have subject-matter jurisdiction over suits brought under IGRA.

Seminole Tribe of Florida v. State of Florida, et al., 11 F. 3d 1016, 1019 (11th Cir. 1994). The Court went on to hold that absent one of the accepted exceptions:

> [T]he Eleventh Amendment serves as a jurisdictional bar and precludes federal Court adjudication over these suits.... [T]hese cases must be dismissed for lack of subject matter jurisdiction.

Id. at 1029. While the Eleventh Amendment is often referred to in terms of sovereign immunity, the Court below correctly characterized the amendment's bar as ***jurisdictional***. Once the Court determines that subject matter jurisdiction is lacking, it is inappropriate to make substantive decisions, in this case creating a remedy, concerning the rights and responsibilities of the parties.[2]

This Court has noted that when considering a jurisdictional question, analyzing and commenting on the substantive aspects of the case is inappropriate. *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf and Eddy,* 506 U.S. ___,

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2 Although arguably *dicta*, part V of the 11th Circuit's opinion has generated applications to the Secretary of the Interior pursuant to the language of that section. Part V has also generated a conflicting opinion from the 9th Circuit. *Spokane Tribe of Indians v. Washington State,* ___ F. 3d ___, 1994 WL 316443, *6 (9th Cir. 1994)

121 L.Ed.2d 605 (1993) addressed the appealability of denial of an Eleventh Amendment defense. The Court there found that such a denial could be appealed and remanded the case for further proceedings, stating:

> Moreover, a motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection...whose resolution will generally have *no bearing on the merits* of the underlying action.

Id., 121 L.Ed.2d at 613 (citation omitted, emphasis added). Addressing the specific question raised herein, this Court stated:

> Because the Court of appeals dismissed the appeal on jurisdictional grounds, it did not consider the merits of PRASA's Eleventh Amendment defense and [took] no view as to whether PRASA is actually entitled to the claimed immunity.... We likewise *express no view on the merits* of the immunity claim.

Id., 121 L.Ed.2d at 611 (citation omitted, emphasis added).

In another case where jurisdiction was the question, this Court also declined to address the merits of the claims, holding:

> Consequently, this appeal must be dismissed for lack of jurisdiction *without our considering the merits* of the case.

United States v.Sisson, 399 U.S. 267, 270 (1970). Recognizing its inability to reach the merits because of the lack of jurisdiction, this Court stated:

> We have today granted certiorari in Gillette v. United States...and Negre v. Larsen...in order to consider the "selective" conscientious objector issue that underlies the case now before us but

> which *we cannot reach because of our conclusion that we have no jurisdiction* to entertain this direct appeal.

Id. at 270n.1 (citations omitted, emphasis added).

Finally, the 11th Circuit itself recognized the impropriety of making substantive comment where jurisdiction is lacking in *The News Journal v. Foxman,* 939 F. 2d 1499 (11th Cir. 1991), holding:

> In denying the News-Journal's motion for reconsideration based on *Younger,* the district Court also commented upon the substance, particularly the scope, of the restrictive order. In essence, the district Court analyzed the restrictive order under the First Amendment, although it abstained under *Younger. Any substantive commentary and analysis is inconsistent with abstention for lack of jurisdiction* based on *Younger.*

Id. at 1511 (emphasis added). *Foxman* involved abstention under *Younger;* this case involves lack of subject matter jurisdiction under the Eleventh Amendment. It was even more important for the Court below to refrain from "analyz[ing] the effect of [its] holding"[3] when the jurisdictional bar of the Eleventh Amendment is involved.

This Court should exercise its power of supervision over the actions of the 11th Circuit and remove the discussion of the effect of the court's holding that the case should be dismissed for lack of jurisdiction. That discussion flies in the face of the clear dictates of this Court and the 11th Circuit itself that where subject matter jurisdiction is lacking, the case should be dismissed without any substantive comment.

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3 *Seminole Tribe,* 11 F. 3d at 1019.

THE REMEDY SUGGESTED IN PART V OF THE LOWER COURT'S OPINION IS NOT FOUND IN IGRA AND IS INCONSISTENT WITH THE INTENT OF CONGRESS REGARDING THE ROLE OF THE STATES IN THE COMPACT PROCESS

As the Court below recognized in its analysis of the Tribes' alleged "liberty interest" arising from *Board of Regents v. Roth,* 408 U.S. 564 (1972), the compacting process envisioned by IGRA is discretionary.

> IGRA does not create an entitlement to operate gambling operations; rather, it establishes the process and standards by which gambling may be conducted on Indian lands.

Seminole v. Florida, 11 F. 3d at 1025. That process is set forth in 25 U.S.C. § 2710(d).

The process for class III gambling under IGRA can be outlined briefly as follows:

1. Class III activities are lawful only under a Tribal ordinance, in a state that permits such gaming, and under the terms of a Tribal State compact. § 2710(d)(1)

2. The Tribe must request that the State enter into negotiations for the completion of a compact. The State is required to negotiate in good faith. § 2710(d)(3)

3. Compacts must be approved by the Secretary of the Interior. § 2710(d)(3)(B)

4. If the State fails to enter into negotiations or fails to negotiate in good faith, the Tribe can, after 180 days from the initial compact request, file suit in the United States District Court. § 2710(d)(7)(B)(i)

5. The Court shall order the Tribe and the State to conclude a compact within 60 days, ***if and only if*** it finds that the State has not negotiated in good faith. § 2710(d)(7)(B)(iii)

6. If a compact is not completed within the 60 day period, then the Court shall appoint a mediator who shall pick a compact from the last best offers of the State and the Tribe. The compact selected must be the one which best comports with the terms of the Act (IGRA), other applicable federal law and the findings and order of the Court. § 2710(d)(7)(B)(iv)

7. The State and the Tribe then have 60 days in which to accept the mediator's choice. Absent that consent, the *mediator* shall inform the Secretary (of Interior) and the Secretary shall prescribe regulations for class III gambling which are consistent with the proposed compact chosen by the mediator, the provisions of IGRA, and the relevant provisions of the laws of the state. § 2710(d)(7)(B)(vii)

The process set forth in part V of the lower Court's opinion is not found in these provisions of IGRA. The Court would delegate to the Secretary of the Interior both the determination of good faith and of the scope of gambling permitted in the State. Congress, however, granted the Secretary limited *regulatory* discretion in § 2710(d)(7)(B)(vii) — the power to prescribe regulations consistent with a mediators choice of compact. This subsection does not grant the Secretary the *legislative* discretion to decide what class III gambling to permit or not permit. *See American Federation of Gov. Employees v. Pierce,* 697 F. 2d 303, 306 (D.C. Cir. 1982). While a such a broad delegation might be upheld, *see Mistretta v. U.S.,* 488 U.S. 361, 373-74 (1989), IGRA, by contrast, grants only a limited regulatory discretion. *See Panama Refining Co. v. Ryan,* 293 U.S. 388, 415-30 (1935).

It is inappropriate for a federal executive official to make these determinations where Congress left them to the States and Tribes as equal partners at the bargaining table.

Also under part V, there is no need for a finding of lack of good faith on the part of the state, which is the condition precedent for all of the mediation and Secretarial involvement under the terms of the IGRA. All subsections after § 2710(d)(7)(B)(i) are inextricably entwined with the preceding subsections. Clause (vii), upon which the court below depended for its remedy, by its very terms depends on the preceding clauses for its meaning, to wit:

> If a State does not consent during the 60 day period described in *clause (vi)* to a proposed compact submitted by a mediator under *clause (v)*, the *mediator shall notify the Secretary* and the Secretary shall prescribe, in consultation with the Indian Tribe, procedures —
>
> (I) which are *consistent with the proposed compact selected by the mediator* under *clause (iv)*, the provisions of this Act, and the relevant provisions of the laws of the State, and [] (II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

25 U.S.C. § 2710(d)(7)(B)(vii) (emphasis added). The Secretary's ***only*** authority to prescribe regulations is not independent of, but is inextricably tied to, the process set forth in §§ 2710(d)(7)(A)(ii) through 2710(d)(7)(B)(vi).

Furthermore, it is the mediator who approaches the Secretary of the Interior and the Secretary is constrained by the terms of the compact chosen by the mediator and State law. 25 U.S.C. § 2710(d)(7)(B)(vii) The process outlined by the Court below ignores these constraints and, as a practical matter, removes the State from the process entirely. The Tribe need only request a compact and file suit after 180 days regardless of the behavior of the State. Missing from the Court's proposed remedy and essential to the statutory process is the finding of bad faith and the

intercession of a mediator who presents a compact to the Secretary. Under no provision of the Act can the Tribes petition the Secretary and under no provision of the Act can the Secretary prescribe regulations when the State has been negotiating in good faith.[4]

The Court's *dicta* in part V ***creates*** a remedy inconsistent with the plain language of the statute in an effort to grant a remedy to the Tribes.[5] The Court then goes on to say that the new remedy is consistent with the intent of Congress. In doing so, the Court has sacrificed the States' role in an effort to effectuate its notion of the broad intent of Congress.

> Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statutes primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 526 (1987). The process and the remedy set forth in § 2710(d)(7) was:

> [T]he result of the Committee balancing the interests and rights of the tribes to engage in gaming against the interests of the States in regulating such gaming.

S.Rep. 100-446, S. 555, 100th Cong., 2d Sess., 14. The Eleventh Circuit even recognized that IGRA was passed:

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4 The State of Florida had negotiated in good faith but, under part V of the opinion, could be faced with regulations imposed by the Secretary of the Interior for class III gambling. This is not what Congress intended for a state which has complied with the dictates of IGRA, 25 U.S.C. § 2710(d)(3)(A).

5 It is ironic that the court below, in footnote 14, criticized the Washington District Court in the *Spokane* case for doing exactly that.

> [A]fter contentious debate concerning the appropriate state role in the regulation of Indian gaming.

Seminole Tribe, 11 F. 3d at 1019. The 11th Circuit's attempt to legislate a new remedy is inappropriate and it should be left to Congress to reevaluate the balance of interests and purposes of this act in fashioning a new remedy, if one is needed. The Court of Appeals is not free to fashion remedies that Congress has specifically chosen not to extend. *Landgraf v. U.S.I. Film Products,* ___ U.S. ___, n. 36, 62 U.S.L.W. 4255, 4267 n.36 (April 26, 1994); *see Northwest Airlines, Inc. v. Transportation Workers,* 451 U.S. 77, 97 (1981).

The fallacy of this process can be shown by the facts of the case before this Court. The Seminole Tribe requested a compact and proceeded to file suit against the State of Florida. The Court below found that the State had ***not*** failed to negotiate in good faith.[6] *See Seminole Tribe v. Florida,* order on summary judgment, found at appendix E. The Tribe would not, under IGRA as written by Congress, be entitled to mediation or Secretarial involvement. However, under part V of the lower court's opinion, even in the face of a finding of good faith on the part of the State, the Seminole Tribe can apply to the Secretary for procedures. This locks

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6 The Court below thought it was faced with the question of what remedy was left to a Tribe "faced with a State that not only will not negotiate in good faith, but also will not consent to suit." *Seminole Tribe,* 11 F. 3d at 1029. That is clearly not the case. A Tribe may be faced with a state which is negotiating in good faith without reaching an agreement within the 180 day period. Under IGRA, such a Tribe (like the Seminoles herein) is granted no relief. The instant case proves the point. Under the process envisioned by the 11th Circuit, Florida is placed in the position of negotiating in good faith (*see* appendix E), asserting its sovereign immunity, but seeing the Tribe apply to the Secretary of the Interior for regulations for gambling which is criminally prohibited in this State and contrary to its public policy. That is an end not envisioned by IGRA, which allows for gambling on Indian lands only when consistent with the criminal laws and public policy of the State. 25 U.S.C. § 2701(5).

the State out of the process, contrary to the intent of Congress.

Congress did not treat all forms of gaming equally in the passage of the IGRA. Class III gaming is generally barred by the Act. Some of the specific language chosen by Congress in enacting IGRA, and statements made by its principal sponsor, illustrate the understanding Congress had of its intended effect on class III gaming.

In criticizing H.R. 1920, the leading bill of the 99th Congress, Senator Inouye, the prime sponsor of S. 555, and Senator Gorton, stated:

> We oppose H.R. 1920 as reported. The bill allows Indian tribes to engage in, or to allow other persons to engage in, high stakes commercial gaming free from any meaningful control by the states or federal government.
>
> . . .
>
> It is a dangerously deceptive bill because, while it may appear to some to set out meaningful federal supervision over tribal gaming, it actually merely ratifies the status quo and leaves the tribes free to do about what they are already doing in this area.

S. Rep. No. 493, 99th Cong., 2d Sess,. pp. 28-29 (1986).

The bill which Senator Inouye introduced the following year corrected that perceived deficiency. As Senator Inouye stated in opening hearings on S. 555, June 18, 1987:

> In S. 555, which I introduced prior to the Supreme Court's decision in the *Cabazon* case, class III would be banned unless the tribe requests the Secretary to consent to a transfer of jurisdiction to a State for the regulation and enforcement of State laws governing class III gaming.

S. HRG. No. 341,100th Cong., 1st Sess., p. 1 (1987).[7]

The final version of S. 555 contains a similar ban, although it is worded somewhat differently to accommodate IGRA's provision for a negotiated Tribal-State compact. 25 U.S.C. § 2710(d)(1). As the Senate Report indicates, "S. 555 does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-State compact." Senate Report 100-446, S.555, 100th Cong. 2d Sess., 6.

The reason that Congress deemed it necessary to restrict tribal authority to conduct class III gaming in the absence of State jurisdiction, rather than leave it to a federal oversight agency, is also found the Act, 25 U.S.C. § 2701(3), and in the Senate Report:

> [T]he Committee notes that there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place. Thus a logical choice is to make use of existing State regulatory systems.

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7 S. 555, as originally introduced (February 19, 1987), defined class III gaming as it appears in the IGRA. However, Section 11(d) of the original bill provided:

> (1) Except as provided in paragraph (2) of this subsection, *class III gaming shall be unlawful on any Indian lands* under section 1166 of title 18, United States Code.
> (2) A gaming activity on Indian lands that is otherwise legal within the State where such lands are located may be exempt from the operation of paragraph (1) of this subsection where the Indian Tribe requests the Secretary to *consent to the transfer of all civil and criminal jurisdiction. ...to the State within which such gaming enterprises is to be located* and the Secretary so consents.

S. HRG. No. 341, 100th Cong., 1st Sess., p. 21 (1987) (emphasis added).

Senate Report 100-446, S.555, 100th Cong. 2d Sess., 13-14 Senator Inouye expanded upon this issue in introducing the legislation on the Senate floor:

> The issue has been how to resolve the clash between States and tribes with respect to sophisticated forms of gaming such as casinos and parimutuel wagering....
>
> *[I]t is simply not realistic for any but a few tribes to set up regulatory systems. Nor did the Select Committee on Indian Affairs view as meritorious any suggestions for the establishment of a Federal regulatory mechanism to duplicate what already exists at the State level....*
>
> Thus, the best option available is the approach taken by the committee on S. 555 and that is the tribal-State compact approach.

Congressional Record, September 15, 1988, S. 12650, col. 2. (Emphasis added.)

Thus, the legislative history of the IGRA, and the final provisions which were adopted into the Act make clear that with regard to the class III gambling at issue in this case the principle function of the IGRA was to eliminate such operations, unless certain restrictive conditions were met. State participation in the compacting and regulatory processes was key to Congress. Neither the federal government nor the Tribes have the ability to regulate this type of gambling.

In IGRA, Congress attempted to provide a process which protected the significant interests of *all* of the parties, the State, Federal, and Tribal governments. Indeed, Congress noted that the entire § 2710(d) was:

> ...the result of the Committee balancing the interests and rights of the tribes to engage in gaming against the interests of the States in regulating such gaming.

Senate Report 100-446, S.555, 100th Cong. 2d Sess. 14. The Committee noted that the provision permitting the tribe to sue the state on the basis of a lack of good faith negotiation was designed as the least offensive option "to encourage the states to deal fairly with the tribes as sovereign governments," *id,* but also noted that the state had legitimate governmental interests to protect. Congress made no provision for the Secretary of Interior to substitute his discretion for that of the state regarding difficult issues of state gambling law. *Spokane Tribe of Indians v. Washington State,* ___ F. 3d ___, 1994 WL 316443, *6 (9th Cir. 1994)

Against this background, it is clear that it was critical for Congress to have the States involved in the compacting and regulatory process. The procedure suggested by the Court below in part V of its opinion, by effectively taking the States out of the process, leaves the Secretary with the choice of having the federal government regulate class III gambling or allowing the Tribes to self-regulate; both of these alternatives are contrary to the intent of Congress. Therefore, even if it was proper for the Court to reach the issues in part V of its opinion, the resulting process is inconsistent with the intent of Congress in crafting the delicate compromise which became IGRA.

THE COURT BELOW ERRONEOUSLY ENGAGED IN SEVERABILITY ANALYSIS WHERE IT MERELY ADDRESSED THE VALIDITY OF THE JURISDICTIONAL BAR OF THE ELEVENTH AMENDMENT

The question presented to the Appeals Court (in its own words) was:

> [W]hether Congress successfully abrogated the States' Eleventh Amendment sovereign immunity from suit by enacting the Indian Gaming Regulatory Act[.]

Seminole v. Florida, 11 F. 3d at 1018. The answer to that question was:

> Congress did not possess that power when enacting IGRA under the Indian Commerce Clause, U.S. Const art. I, § 8, cl. 3. Thus, the States retain their sovereign immunity and the federal Courts do not have subject matter jurisdiction over suits brought under IGRA.

Id. at 1019. Both the question posed, and the answer given, address the validity of the jurisdictional bar of the 11th Amendment. In part V of the opinion, the court, discussing the effect of its ruling, states that:

> One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district Court.

Id. at 1029. This procedure outlined by the Court must necessarily envision the continuing validity of 25 U.S.C. §§ 2710(d)(7)(A)(i) and (B)(i). These sections maintain their viability where a state consents to suit. *Id.* at 1029n.15. Engaging in severability analysis under 25 U.S.C. § 2721 is inappropriate where the court merely

addresses the validity of a jurisdictional bar.[8] All of the cases involving questions of severability which could be found involved a section of an act which was declared unconstitutional, not the case here.

All the court below did was validate a defense available to the States. If Congress mistakenly assumed that that defense was unavailable to the States, then it is up to Congress to reevaluate the compromise which became IGRA in light of this defense. It is not appropriate for the Court below to rewrite the statute and fashion a remedy which, as has been shown, *supra*, is nowhere to be found in the statute as written and is inconsistent with the

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8 In *Apache Tribe of the Mescalero Reservation v. New Mexico*, slip op. CIV 92-076-JC (12-22-92)(DCNM), the district Court stated:

> As in my order denying the Pueblo of Sandia's motion to amend or alter the dismissal order in CIV 92-613JC, I further determine that it would be *improper for this Court to address the severability issue* raised by the Apache Tribe of the Mescalero Reservation.

intent of the law to include the states as participants in the process of approving Indian gambling within the respective States.[9]

9 In a recently decided case, the Ninth Circuit Court of Appeals found that Congress could abrogate the States' 11th Amendment immunity in IGRA and, in doing so, commented on the remedy addressed in this Cross-Petition, stating:

> The Eleventh Circuit reasoned that a void was not necessary because the provisions of the statute authorizing the Secretary of the Interior to impose regulations would come into effect once a state asserted immunity from suit. When that occurred the Secretary of the Interior would, in the Eleventh Circuit's view, remain authorized to impose regulations for Class III gaming. *Seminole Tribe*, 11 F. 3d at 1029. In our view, however, ***such a result would pervert the Congressional plan.*** This is because the Secretary of the Interior under the statute is to act only as a matter of last resort, and then only after consulting with the court appointed mediator who has become familiar with the positions and interests of both the tribes and the states in court directed negotiations. 25 U.S.C. § 2710(d)(7)(B)(iv)-(vii). The Eleventh Circuit's solution would turn the Secretary of the Interior into a federal czar, contrary to the Congressional aim of state participation.

Spokane Tribe of Indians v. Washington State, ___ F. 3d ___, 1994 WL 316443, *6 (9th Cir. 1994) (emphasis added).

CONCLUSION

This court should grant *certiorari* in this cross petition and remand this case to the appeals court below with instructions to revise its opinion, excising the discussion in part V. This court should grant *certiorari* because the court below has sufficiently departed from the accepted and usual course of judicial proceedings by commenting on and deciding the merits of a case after holding that there was not subject matter jurisdiction; for creating a remedy which is inconsistent with Congress' clearly stated intent to protect the interests of the states by requiring their participation in the regulation of class III gambling; and for engaging in severability analysis creating a remedy for the Tribe where the court merely addressed a jurisdictional bar.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

STATE OF FLORIDA and LAWTON CHILES, Governor,
Cross-Petitioners

v.

SEMINOLE TRIBE OF FLORIDA,
Cross-Respondents

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CROSS-PETITIONER'S APPENDIX TO CROSS-PETITION FOR WRIT OF CERTIORARI

APPENDICES

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APPENDIX A

SEMINOLE TRIBE OF FLORIDA,
Plaintiff-Appellee,
v.
STATE OF FLORIDA, Lawton Chiles,
Governor of the State of Florida,
Defendants-Appellants.

POARCH CREEK INDIANS,
Poarch Band of Creek Indians,
Plaintiff-Appellant,
v.
STATE OF ALABAMA, James E. Folsom,
Governor, State of Alabama
Defendants-Appellees.
Nos. 92-4652, 92-6244.

United States Court of Appeals
Eleventh Circuit
Jan. 18, 1994.

Appeal from the United States District Court for the Southern District of Florida.

Appeal from the United States District Court for the Southern District of Alabama.

Before TJOFLAT, Chief Judge, BLACK, Circuit Judge, and JOHNSON, Senior Circuit Judge.

TJOFLAT, Chief Judge:

These two consolidated cases present the following issue: whether Congress successfully abrogated the states' Eleventh Amendment sovereign immunity from suit by enacting the

Indian Gaming Regulatory Act ("IGRA"), Pub.L. No. 100-497, 102 Stat. 2467(1988) (codified at 25 U.S.C. §§ 2701-21).[1] The two district court judges below agreed that IGRA manifested Congress' attempt to abrogate the states' Eleventh Amendment immunity; they disagreed, however, as to whether Congress possesses the power under the Constitution to accomplish that abrogation.

We hold that, although decisions of the Supreme Court demonstrate that Congress does possess the power to abrogate the states' Eleventh Amendment sovereign immunity in certain cases, Congress did not possess that power when enacting IGRA under the Indian Gaming Commerce Clause, U.S. Const. art. I, § 8, cl. 3. Thus, the states retain their sovereign immunity and the federal courts do not have subject-matter jurisdiction over suits brought under IGRA. Accordingly, these cases must be dismissed.

In part I, we provide a brief summary of the Indian Gaming Regulatory Act here at issue. In part II, we set forth the facts relevant to these cases. After establishing our jurisdiction and the appropriate standard of review in part III, we examine the Eleventh Amendment issues in part IV and then analyze the effect of our holding in part V.[2]

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1 Unless so indicated, all cited sections refer to Title 25 of the United States Code.

2 Defendants raise one issue for the first time on appeal: the Tenth Amendment. Citing the Supreme Court's decision in *New York v. United States*, ___ U.S. ___, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), in which the Court held that Congress could not coercively interfere with the reserved powers of the states, defendants contend that IGRA coercively forces the states to negotiate with Indian tribes in violation of the Tenth Amendment.

"It is not the practice of this court to consider issues on appeal that were not raised in the district court." *Allen v. Alabama*, 728 F.2d 1384, 1387 (11th Cir. 1984); *Moore v. Morgan*, 922 F.2d 1553, 1556 n. 3 (11th Cir. 1991). Accordingly, we decline to address defendant's contention.

I.

In 1987, the Supreme Court held that a state could not enforce its "civil/regulatory" gaming laws in a manner that would prohibit gaming on Indian lands within its borders. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). That decision left Indian gaming largely unregulated by the states; similarly, "existing federal law d[id] not provide clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. § 2701(3). In an attempt to supply some much-needed regulation, and after contentious debate concerning the appropriate state role in the regulation of Indian gaming, Congress enacted the Indian Gaming Regulatory Act. IGRA's primary purpose was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." § 2702(1). In order to accomplish this goal, Congress defined classes of Indian gaming, § 2703(6)-(8); established the National Indian Gaming Commission to monitor and regulate some forms of Indian gaming; §§ 2704-08; and provided a compacting procedure by which states might participate in the regulation for certain forms of Indian gaming, § 2710(d).

Briefly summarized, Congress divided Indian gaming into three "classes." Class I gaming, which is governed and regulated solely by individual Indian tribes, includes little more than "social games solely for prizes of minimal value...." § 2703(6). Class II gaming, which is subject to certain federal regulations, includes bingo and comparable games as well as non-banking card games where not prohibited by law.[3] § 2703(7)(A). Neither of these classes is relevant to the cases on appeal.

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3 Non-banking card games are those in which the gamblers compete against each other rather than against the house.

These cases address the third class of gaming. Class III gaming is defined residually: it includes "all forms of gaming that are not class I gaming or class II gaming." § 2703(8). Specifically excluded from class II, and therefore within the parameters of class III, are banking card games and "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." § 2703(7)(B). Class III gaming is the type of gaming most profitable to the tribes; it also is the gaming in which the states desire the greatest regulatory oversight.

In order to achieve a compromise between the interests of the states and the interests of the Indian tribes, Congress mandated that class III gaming activities would be lawful on Indian lands only when those activities are (a) authorized by the tribe; (b) located in a state that permits such gaming; and, most importantly, (c) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State...that is in effect." § 2710(d)(1). To ensure that dilatory actions by the state could not preclude or unreasonably delay Indian gaming, IGRA also delineated a negotiating process designed to culminate in the Tribal-State compact and provided mechanisms to remedy state misconduct.

Under the statute, the tribe initiates the compacting process by requesting that the state enter into negotiations for the purpose of concluding a Tribal-State compact governing the conduct of gaming activities; in IGRA, Congress mandated that the state "shall negotiate with the Indian tribe in good faith to enter into a compact." § 2710(d)(3)(A). If these negotiations bear fruit, the compact must be approved by the Secretary of the Interior and published in the Federal Register. § 2710(d)(8).

Congress also anticipated that Tribal-State negotiations would not always produce a mutually satisfactory compact; it thus provided tribes with a remedy in the federal courts:

(A) The United States district courts shall have jurisdiction over —
(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith....

* * * *

(B)(i) An Indian tribe may initiate a cause of action described in
subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

Section 2710(d)(7)(A)(i) & (B)(i). If the district court finds that the state indeed has failed to negotiate in good faith, that court "shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." § 2710(d)(7)(B)(iii). If that fails, "the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact." § 2710(d)(7)(B)(iv). The mediator then selects the better of the two proposals and submits it to the tribe and the state. The states then either may consent to the compact within sixty days, in which case the compact is treated as if it were the product of negotiations; or may refuse to consent, in which case the Secretary of the Interior provides procedures to regulate the tribe's class III gaming. § 2710(d)(7)(B)(vi) & (vii).

Defendants in these two cases assert that the federal jurisdiction granted by § 2710(d)(7) is contrary to their Eleventh Amendment sovereign immunity and demand that the tribes' cases be dismissed.

II.

The facts of these cases are few and easily summarized. The first case, *Seminole Tribe of Florida v. Florida,* No. 92-4652, was filed by the Seminole Tribe, federally recognized as a tribe under Section 16 of the Indian Reorganization Act, 25 U.S.C.A. § 476 (West 1983 & Supp. 1993). The complaint, filed in the Southern District of Florida on September 19, 1991, asserted jurisdiction largely under 25 U.S.C. § 2710(d)(7)(A)(i) and alleged that the State of Florida and its governor, Lawton Chiles, had "failed to respond in good faith to the Tribe's request for compact negotiations and have not conducted those negotiations in good faith." Defendants moved to dismiss the complaint for lack of subject-matter jurisdiction based on the sovereign immunity enjoyed by the State of Florida and the Governor of Florida under the Eleventh Amendment. On June 18, 1992, the district court denied the motion, 801 F.Supp. 655 (S.D.Fla.1992) (*"Seminole"*), and this interlocutory appeal ensued.

The second case, *Poarch band of Creek Indians v. Alabama,* No. 92-6244, presents a similar initial fact pattern. The Poarch Band, also a federally recognized tribe, filed suit against the State of Alabama and its governor, Guy Hunt (for whom the current governor, James E. Folsom, Jr., has been substituted), on September 11, 1991. Also asserting jurisdiction largely under 25 U.S.C. § 2710(d)(7)(A)(i), the complaint is designed to resolve for the State and the Tribe various questions regarding IGRA's definition of class III gaming. The State of Alabama's answer claimed a defense of sovereign immunity under the Eleventh Amendment; the district court granted the State's subsequent motion to dismiss based upon this defense on October 30, 1991. 776 F.Supp. 550 (S.D. Ala. 1991) (*"Poarch I"*).[4] The governor also

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4 The district court dismissed the State of Alabama from the Poarch Band's amended Complaint in an unpublished order dated January 24, 1992.

filed an Eleventh-Amendment-based motion to dismiss; the district court granted it on February 20, 1992, thus dismissing the final defendant and terminating the Poarch Band's suit. 784 F.Supp. 1549 (S.D.Ala. 1992) (*"Poarch II"*). It is from these orders that the Poarch Band appeals.

III.

We have jurisdiction over these consolidated cases pursuant to 28 U.S.C. § 1291. In *Poarch I* and *Poarch II,* the district court granted defendants' sovereign-immunity-based motions to dismiss, thus terminating the tribe's suit and giving rise to our appellate jurisdiction over final orders. Our jurisdiction in *Seminole* arises from the district court's *denial* of defendants' motion to dismiss based on sovereign immunity; such a denial grants defendants the right of an immediate, interlocutory appeal. *See Griesel v. Hamlin,* 963 F.2d 338, 340 (11th Cir. 1992).

The granting or denial of a sovereign immunity defense is an issue of law subject to *de novo* review by this court. *McDonald v. Hillsborough County School Bd.,* 821 F.2d 1563, 1554 (11th Cir. 1987).

IV.

For more than a century, judicial interpretation of the Eleventh Amendment has far exceeded the apparent scope of the amendment's actual provisions. The scope of the "textual" amendment is rather limited and serves only to restrict the Article III diversity jurisdiction of the federal courts:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

In 1890, however, the Supreme Court rejected this facial reading. In *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), the Court recognized that the Eleventh Amendment "reflected... a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away." *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 31-32, 109 S.Ct. 2273, 2297, 105 L.Ed.2d 1 (1989) (Scalia, J., concurring in part and dissenting in part). Thus, the Court determined that the principle of sovereign immunity, although omitted from the text of the Constitution, survived the Constitutional Convention.

It did not survive untarnished, however; the Court subsequently has held that the states' immunity is not absolute. More specifically, the states are not immune from suit if the circumstances indicate consent, abrogation, or the fiction of *Ex parte* Young. If none of these three exceptions applies, however, the Eleventh Amendment serves as a jurisdictional bar to the suit. *See Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). We address each exception to Eleventh Amendment immunity in turn.

A.

First, the Supreme Court has held that the states may not rely on the defense of sovereign immunity if they have consented to suit. A court may find consent in three circumstances. The clearest of the three, known as express consent, usually takes the form of legislative enactment. The second form of consent derives from the states' ratification of the Constitution. This "plan of the convention" consent assumes that, by ratifying the Constitution and joining the republic, each state ceded certain powers to the federal system;

implicit in this cession is the understanding that the state necessarily also consented to suit in certain cases. Thus, the Court has held that, by ratifying the Constitution, the states waived their immunity to suits by the United States, *see, e.g., United States v. Texas,* 143 U.S. 621, 641-46, 12 S.Ct. 488, 492-94, 36 L.Ed. 285 (1892); and by sister states, *see, e.g., South Dakota v. North Carolina,* 192 U.S. 286, 24 S.Ct. 269, 48 L.Ed. 448 (1904). Finally, the Court has created a third, extremely limited category of consent. This consent is premised on the state's participation in a congressional program which, as a prerequisite for participation, mandates that the state consent to suit. The Court has found this form of consent to exist in only one case: *Parden v. Terminal Railway of Alabama,* 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964).

We find that neither Alabama nor Florida has consented to a suit under IGRA.

1.

Express waivers of a state's Eleventh Amendment sovereign immunity must be explicitly authorized by the state "in its Constitution, statutes and decisions." *Silver v. Baggiano,* 804 F.2d 1211, 1214 (11th Cir. 1986) (quoting *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 467, 65 S.Ct. 347, 352, 89 L.Ed. 389 (1945)). *See also Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The Alabama defendants cite Article I, section 14 of the Alabama Constitution, which specifically reserves Alabama's sovereign immunity, and claim that Alabama therefore could not have consented to a suit under IGRA. Even though Florida has not raised a similar defense, plaintiffs have failed to demonstrate that either state has given express consent to this suit. Therefore, we find that the states have not expressly waived their Eleventh Amendment sovereign immunity.

2.

Nor does "plan of the convention" consent imperil the states' sovereign immunity. Three terms ago, the Supreme Court addressed the question whether the states, by ratifying the Constitution, had surrendered their sovereign immunity to suits by Indian tribes. The court compared suits brought by sister states to suits brought by Indian tribes and held that the states had not waived their sovereign immunity to suits brought by Indian tribes under the "plan of the convention":

> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of the concession. There is not such mutuality with either foreign sovereigns or Indian tribes.... [I]f the convention could not surrender the *tribes'* immunity for the benefit of the *States,* we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford v. Native Village of Noatak, ____ U.S. ____, ____ — ____, 111 S.Ct. 2578, 2582-83, 115 L.Ed.2d 686 (1991) (emphasis in original). The Court's holding in *Blatchford* governs our resolution of this issue. Thus, we hold that the states cannot be said to have surrendered their sovereign immunity under the "plan of the convention."

3.

Finally, the tribes assert that both Florida and Alabama have consented to this suit by participating in negotiations under IGRA. Invoking *Parden,* 377 U.S. 184, 84 S.Ct. 1207 (1964), the tribes assert that the states have attempted to reap the benefits of IGRA and therefore should be held to have consented to the downside of the statute, specifically, federal jurisdiction over the present suits. We disagree.

In *Parden,* the Supreme Court for the first — and, to date, last — time found that a state had waived its immunity to suit by participating in a federal program mandating that participants consent to suit. The facts of that case, as well as subsequent Supreme Court decisions, render *Parden* inapplicable to the appeals at hand.

First, it is apparent that *Parden* was decided largely on its facts. In that case, the State of Alabama had operated a for-profit, state-owned railroad for twenty years. By operating the railroad in interstate commerce, Alabama effectively had transcended the typical realm of state authority by entering the private market, a market in which all employers were subject to the strictures passed by Congress. The limited holding of the Court was that, based on these facts, Alabama should be subject to the same requirements as the other (private) participants in the private market; one of those requirements was that all market actors consent to suit. These cases involve state governments negotiating with sovereign tribes located within the states' borders — hardly a "private" activity — and thus do not raise the same concerns that prompted the Supreme Court's unique decision in *Parden.*

Second, later decisions of the Supreme Court limit *Parden* and indicate that Alabama and Florida cannot be said to have consented to suit in this case. First, in *Employees v. Missouri Dep't of Public Health and Welfare,* 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), the Court declined to extend *Parden* to circumstances in which a state was operating a non-profit hospital facility, a traditional state activity. The next year, in *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Court refused to find *Parden*-style consent when Illinois participated in a federal program by agreeing to administer federal and state funds in accordance with federal law. The Court reiterated this holding a decade later in *Atascadero State Hospital v. Scanlon,*

473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 121 (1985). Finally, the Court further limited *Parden* in *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). In fact, in no other case has the Court found consent pursuant to its *Parden* decision.

When *Parden* and its progeny are examined closely, it is apparent that, although *Parden* may not be entirely dead, it certainly is not quick enough to breath life into the Indian tribes' claims in these cases. In these cases, the states were faced with a Hobson's choice: refuse to negotiate with the tribes, and therefore be subject to suit under IGRA; or negotiate with the tribes, and therefore (according to the tribes' argument) consent to suit under IGRA. Thus, we cannot find the same voluntary, for-profit, private-enterprise operation involved in *Parden* and decline to hold that Alabama and Florida consented to suit.[5]

Thus, we find that neither Florida nor Alabama consented, either expressly, implicitly, or by conduct under *Parden,* to suit in federal court under IGRA.

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5 One sister circuit, in determining that the Eleventh Amendment did not bar suits under IGRA, mentioned that the state had "actively engaged in negotiating tribal-State compacts and ha[d] reaped the benefits from these negotiations." *See Cheyenne River Sioux Tribe v. State of South Dakota,* 3 F.3d 273 (8th Cir 1993) *("Cheyenne II") aff'd* 830 F.Supp. 523 (D.S.D. 1993) (*"Cheyenne I"*). As the Eighth Circuit Court of Appeals primarily rested its decision on the fact that Congress had abrogated the state's Eleventh Amendment immunity, and argument we discuss (and reject) in part III.B., below, it is not clear how much weight the court gave to the state's participation in negotiations. To the extent that the Eighth Circuit relied on South Dakota's negotiations as a basis for finding a waiver of sovereign immunity, we respectfully disagree.

B.

In defining the second sovereign immunity exception, the Supreme Court has held that states also may not rely on the defense of sovereign immunity if Congress has specifically abrogated that defense when legislating pursuant to certain of its plenary powers. *See, e.g., Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (finding abrogation in legislation passed pursuant to § 5 of the Fourteenth Amendment), and *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d (1989) (finding abrogation in legislation passed pursuant to the Congress' Article I, § 8 plenary power over commerce). The Court has not yet found that Congress possesses the power to abrogate the states' sovereign immunity when legislating under any other provisions of the Constitution.

The tribes' most significant argument is that Congress abrogated the states' Eleventh Amendment immunity when it granted jurisdiction to the district courts in 25 U.S.C. § 2710(d). The district court in *Seminole,* as well as one sister court of appeals and a handful of district courts, have adopted the tribes' position.[6] We disagree, believing that Congress, when it enacted IGRA pursuant to the Indian Commerce Clause, lacked the power to abrogate the states' sovereign immunity.[7]

When determining whether Congress has abrogated the states' Eleventh Amendment immunity, we must conduct a two-part inquiry. We first must determine that the "evidence of congressional intent [to abrogate the states' immunity is]

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6 *See Cheyenne II, supra; Kickapoo Tribe of Indians v. Kansas,* 818 F.Supp. 1423 (D.Kan. 1993); *Cheyenne I, supra; Seminole, supra.*

7 Other courts all have held that Congress lacked abrogation power when it enacted IGRA. *See Sault Ste. Marie Tribe of Chippewa Indians v. Michigan,* 800 F.Supp. 1484 (W.D.Mich. 1992); *Ponca Tribe of Oklahoma v. Oklahoma,* 834 F.Supp. 1341 (W.D.Okla. 1992) *Spokane Tribe of Indians v. Washington,* 790 F.Supp. 1057 (E.D. Wash. 1991), *Poarch I, supra.*

both unequivocal and textual." *Dellmuth v. Muth,* 491 U.S. 223, 230, 109 S.Ct. 2397, 2401, 105 L.Ed.2d 181 (1989) (citing *Atascadero,* 473 U.S. at 242, 105 S.Ct. at 3147). We also must find that Congress possessed the power under the Constitution to abrogate the states' Eleventh Amendment sovereign immunity. We hold that Congress expressed its intent sufficiently to survive the first prong of this inquiry. That intent can not be given effect, however, as Congress did not possess the power to abrogate the states' immunity when it enacted IGRA.

1.

Several courts have addressed the question whether Congress unequivocally intended to abrogate the states' immunity when it enacted IGRA. Those courts have had little difficulty concluding that Congress' intent was sufficiently clear. *See, e.g., Cheyenne II, supra; Kickapoo,* 818 F.Supp. at 1427 ("[A] clearer statement of the intent to abrogate is difficult to envision."); *Seminole,* 801 F.Supp. at 658; *Sault Ste. Marie,* 800 F.Supp. at 1489 ("clear statement of waiver"); *Poarch I,* 776 F.Supp. at 557; *Ponca, supra.* We believe the question not so easily resolved.

In *Dellmuth,* the Supreme Court reiterated its earlier holdings that a Congressional declaration abrogating the states' Eleventh Amendment sovereign immunity must be explicit: "As we made plain in *Atascadero,* '[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.' 473 U.S. at 246, 105 S.Ct. at 3149." 491 U.S. at 231, 109 S.Ct. at 2402. At first glance, it would appear that IGRA fails that test: Instead of specifically abrogating the states' immunity, section 2710(d)(7)(A) states only that "[t]he United States district courts shall have jurisdiction...." The mere granting of jurisdiction is not equivalent to the abrogation of a defense.

A closer examination of IGRA, however, reveals that, despite Congress' omission of a specific abrogation clause, Congress nonetheless manifested its intent to abrogate the states' immunity. IGRA gives the federal district courts jurisdiction over three types of cases, the first of which is "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith." § 2710(d)(7)(A)(i). The only possible defendant to such a suit is a state (*see* part IV(C), below). Thus, unless Congress intended to abrogate the states' immunity, this portion of IGRA would be of no effect. Charged as we are with the task of giving effect to each portion of a statute, we must conclude that Congress intended to abrogate the state's sovereign immunity.[8] Thus, we hold that the first prong of our inquiry is satisfied.

2.

More important, and less easily met, is the second prong of our inquiry: whether Congress possessed the constitutional power to abrogate the states' immunity when it enacted IGRA. To resolve this issue, we initially must determine under which provision(s) of the Constitution Congress enacted IGRA (*see* sub-part a). Only then can we determine whether Congress possessed the power to abrogate the states' immunities (*see* sub-part b).

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8 This conclusion is bolstered by Justice Scalia's opinion in *Dellmuth*. Concurring with the Court's majority opinion, Justice Scalia noted that the majority's "reasoning does not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects States to suit for monetary damages, though without explicit reference to State sovereign immunity or the Eleventh Amendment." 491 U.S. at 233, 109 S.Ct. at 2403 (Scalia, J., concurring). Although the facts of that case differ slightly from the case before us, it is clear that Congress in enacting IGRA "clearly subject[ed] States to suit" in § 2710(d)(7).

a.

Congress may pass legislation only when the Constitution gives it the authority to do so. As we mentioned earlier, the Supreme Court has held that Congress possesses abrogation powers only when it enacts legislation under the auspices of (1) Section 5 of the Fourteenth Amendment or (2) the Interstate Commerce Clause. Plaintiff tribes urge us to find that IGRA was passed not only pursuant to the Indian Commerce Clause, but also pursuant to Section 5 and the Interstate Commerce Clause.[9] We cannot so find.

First, as to the Fourteenth Amendment, plaintiff tribes claim that *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (holding that Congress may abrogate states' sovereign immunity when legislating pursuant to Section 5 of the Fourteenth Amendment), controls, thus granting Congress the authority to abrogate the states' immunity in IGRA. To justify this contention, the tribes assert that IGRA creates both a liberty interest and a property interest in the tribes and their members. Neither of these claimed interests, however, find support in the Supreme Court's Fourteenth Amendment jurisprudence.

The alleged liberty interest, the tribes claim, arises from the Supreme Court's holding in *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Stating that the states' input in IGRA is akin to a licensing requirement, the

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9 Both the so-called Commerce Clause and the so-called Interstate Commerce Clause derive from the same constitutional grant of plenary power to Congress in Article I: "The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Although the Interstate and Indian Commerce Clauses are contained in the same textual provision, the purposes that prompted their inclusion in their subsequent legal interpretations, are distinct. *See, e.g., Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192, 109 S.Ct. 1698, 1716, 104 L.Ed.2d 209 (1989) ("It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications.").

tribes assert that the states' failure to enter a compact operates exactly as an unconstitutional denial of a license. The alleged property interest likewise is derived from *Roth*. What the tribes fail to recognize, however, is that these interests are created only when the claimant has "a legitimate claim of entitlement." *Id.* at 577, 92 S.Ct. at 2709. The tribes' bald assertion that IGRA creates such a claim ignores the discretionary nature of the compacting process envisioned by IGRA. IGRA does not create an entitlement to operate gambling operations; rather, it establishes the process and standards be which gambling may be conducted on Indian lands. Thus, IGRA creates no liberty or property interests and cannot implicate the Fourteenth Amendment.

Second, the tribes, noting that Congress' goals in enacting IGRA included "shield[ing] [Indian gaming] from organized crime and other corrupting influences," § 2702(2), assert that Congress necessarily enacted IGRA pursuant to the Interstate Commerce Clause. The tribes look to the legislative history of the Organized Crime Control Act of 1970, Pub.L. No. 91-452, 84 Stat. 922 (1970), to find Congressional reasoning that organized crime burdens interstate commerce. 84 Stat. at 923. The tribes thus conclude that, since Congress meant to address organized crime by enacting IGRA, it passed IGRA under the Interstate Commerce Clause.

We disagree. As § 2702(2) makes clear, Congress' concern with organized crime was not that such activities would burden interstate commerce, but rather that prohibition of organized crime would "ensure that the Indian tribe is the primary beneficiary of the gaming operation, and...assure that gaming is conducted fairly and honestly by both the operator and the players." § 2702(2). In addition, Congress wanted to criminalize the involvement of organized crime in order to "promote[] tribal economic development, self-sufficiency, and strong tribal government." § 2702(1). In analyzing Congress' goals, it is clear that alleviating a

supposed burden on interstate commerce was not among them.

Having excluded the possibility that Congress enacted IGRA under either the Interstate Commerce Clause or Section 5 of the Fourteenth Amendment, we must conclude that Congress enacted IGRA solely under the Indian Commerce Clause. The Supreme Court's jurisprudence on the Indian Commerce Clause bolsters our conclusion that Congress enacted IGRA solely under that authority. *See Cotton Petroleum,* 490 U.S. at 192, 109 S.Ct. at 1716 ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.").

b.

Having determined that Congress enacted ICRA solely under the Indian Commerce Clause, we now must determine whether the Indian Commerce Clause permits Congress to abrogate the states' Eleventh Amendment immunity. We conclude that it does not.

The Supreme Court case most relevant to this issue is *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989). In that case, involving a badly fractured Court, a four-member plurality[10] held that Congress had the power to abrogate the states' Eleventh Amendment immunity when enacting legislation pursuant to the I[illegible]rstate Commerce Clause. The plurality stated that, since the Interstate Commerce Clause

> withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in

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10 Justice Brennan authored the opinion; Justices Marshall, Blackmun, and Stevens joined.

> damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not "unconsenting"; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.

Id. at 19-20, 109 S.Ct. at 2284. Thus, the Court held that the State of Pennsylvania could not invoke sovereign immunity in defending a suit for money damages under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") and the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. § 9601 *et seq.*[11]

In a cryptic concurring opinion, Justice White agreed with Justice Brennan's conclusion that Congress had the authority to abrogate the states' immunity; however, he also stated that he did not "agree with much of [Justice Brennan's]

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11 Congress passed both CERCLA and SARA pursuant to the Interstate Commerce Clause.

reasoning," *id.* at 57, 109 S.Ct. at 2295 (White, J., concurring).[12] It is regrettable that Justice White failed to provide any reasoning of his own to support his conclusion that Congress had abrogation power as his vague concurrence renders the continuing validity of *Union Gas* in doubt. The other four justices fervently opposed the plurality's holding.

Some courts have noted not only that there are weaknesses in the *Union Gas* Court's holding, but also that changes in the composition of the Court make it likely that a majority of the present Court would disagree with *Union Gas* and find that Congress was not empowered to abrogate the states' immunity. Unlike those courts, we refuse to disregard *Union Gas* merely on these bases. Nonetheless, when examined in the proper light, *Union Gas* is distinguishable from the cases before us and does not govern our disposition of this issue. Our conclusion that Congress did not have the power, when enacting IGRA, to abrogate the states' Eleventh Amendment sovereign immunity is supported by two lines of argument.

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12 Justice White's uneasiness is understandable given the questionable foundation on which Justice Brennan built his argument. His plurality opinion contains three significant weaknesses: (1) it disregards the Supreme Court's statements that *Parden v. Terminal Railway of Alabama*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), was a waiver case, not an abrogation case; (2) it misconstrues *Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), by ignoring that it too, solely addressed whether Congress had mandated that Missouri consent to suit before operating a hospital. (Thus, it also was not an abrogation case.); and, (3) it appeared to afford precedential value to two cases, *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 105 S.Ct. 12145, 84 L.Ed.2d 169 (1985), in which the Court *assumed* that Congress had abrogation power, but specifically denied "deciding, or intimating a view of the question." *Welch*, 483 U.S. at 475, 107 S.Ct. at 2947.

First, the tribes begin their argument by assuming that *Union Gas* controls all Commerce Clause cases, Indian as well as Interstate; thus, they assert, we are obligated to hold that Congress successfully abrogated the states' immunity when it passed IGRA.[13] We believe it appropriate, however, to limit *Union Gas* to the factual situation before that Court: the exercise of Congress' power to legislate under the Interstate Commerce Clause. CERCLA and SARA were passed pursuant to the Interstate Commerce Clause, not the Indian Commerce Clause. In addition, each of the opinions — addressed only the Interstate Commerce Clause. Moreover, the opinions do not suggest that the *Union Gas* holding should be broadly construed. Thus, a fair reading of *Union Gas* is one that limits Congress' abrogation powers to laws passed under the Interstate Commerce Clause. As we already have determined that IGRA was passed pursuant to the Indian Commerce Clause, the *Union Gas* holding does not control our disposition of this case.

This conclusion is bolstered by the unique qualities that distinguish the Interstate Commerce Clause and the Indian Commerce Clause. In an attempt to demonstrate this point, defendants suggest that *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S.Ct. 1698, 1716, 104 L.Ed.2d 209 (1989) (explaining that "the Interstate Commerce and Indian Commerce Clauses have different applications"), governs our disposition of these cases. That case, which dealt solely with preemption and multiple taxation issues,

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13 The tribes assert that the *Union Gas* Court used the term "Commerce Clause," not "Interstate Commerce Clause," thus evidencing its intention to grant Congress abrogation powers whenever it acted pursuant to any of the Commerce Clauses, Interstate, Indian, or Foreign. The Court's entire discussion, as well as every case it cited, focused solely on the Interstate Commerce Clause. We therefore conclude that the Court's discussion, although imprecise, implicated only the Interstate Commerce Clause.

plainly is distinguishable from the facts before us; thus, the *Cotton Petroleum* Court's conclusion that the Commerce Clause distinguishes between states and Indian tribes is neither surprising nor controlling precedent. Although not directly on point, however, much of the reasoning that supported *Cotton Petroleum* sheds light on the present issue. In that case, the Court acknowledged the plenary powers under the Interstate Commerce Clause that allow Congress to place limits on the states in order to "maintain[] free trade among the States." *Id.* By contrast, "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Id.* Although Congress has the power to limit the states under the Indian Commerce Clause as well, the different purposes underlying the two clauses mandate that they be treated distinctly. As a result, the unique abrogation power afforded Congress under the Interstate Commerce Clause in *Union Gas* cannot be extended to the Indian Commerce Clause.

A second argument supporting our conclusion that Congress did not possess the power to abrogate the states' immunity is that a proper reading of *Union Gas* and the cases cited therein demonstrates that the court has allowed federal jurisdiction over states only when the states partake in an activity typical of private individuals. For instance, in *Parden,* a case on which the *Union Gas* plurality primarily relied, the State of Alabama was operating a for-profit railroad in interstate commerce. Likewise, in *Union Gas* itself, the State of Pennsylvania was an "owner or operator" of land and therefore, like private citizens, was subject to liability under SARA. On the contrary, when the State of Missouri operated a non-proprietary, not-for-profit hospital (a non-private activity "wholly within [the states'] sphere of authority") the Court refused to find that Congress mandated federal jurisdiction. *Employees,* 411 U.S. at 282, 93 S.Ct. at 1617 (1973).

In this case, the tribes seek to impose jurisdiction over the States of Alabama and Florida for their failure to negotiate a compact with the tribes. Rather than being a typically private activity, such negotiations are "wholly within [the states'] sphere of authority." We believe the Supreme Court's jurisprudence clearly evinces an intent to allow federal jurisdiction over states only when the state's conduct is outside the typical realm of state authority. As negotiations with tribes certainly are not outside that realm of authority, the principles of federalism and sovereign immunity exemplified in the Eleventh Amendment prevent Congress from abrogating the states' immunity. Thus, even if *Union Gas'* reasoning were to give Congress abrogation power under the Indian Commerce Clause *in general,* we would hold that Congress may not abrogate when it legislates in an area typically reserved to the states (such as negotiating regulations with Indian tribes).

For these reasons, we conclude that Congress did not possess the power to abrogate the states' Eleventh Amendment immunity when it enacted IGRA.

C.

Third, the Supreme Court has created a third exception to the doctrine of sovereign immunity by holding that the Eleventh Amendment does not always provide immunity to government officials; in certain circumstances, those officials may be subject to suit, despite the Eleventh Amendment, under the "fiction" of *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Briefly, the fiction allows an individual to obtain a federal injuction against a state officer to force the officer to comply with federal law. *Id.* at 160, 28 S.Ct. at 454. Under the fiction, the tribes assert that they may sue the governors of Alabama and Florida to compel negotiations under IGRA.

The *Ex parte Young* doctrine does not apply in two cases: (1) it cannot be used to compel an executive official to undertake a discretionary task; and (2) it cannot be used if the suit is, in reality, against the state. As most of the courts that have addressed this issue have found, however, the tribes' claims fit into both categories. *See, e.g., Poarch II,* 784 F.Supp. at 1551-52; *Poarch I,* 776 F.Supp. at 562; and *Ponca, supra.*[14]

First, the *Ex parte Young* doctrine cannot compel discretionary acts. *Ex parte Young,* 209 U.S. at 158, 28 S.Ct. at 453. IGRA does not allot merely ministerial acts to the state, however; rather, it provides for the negotiation of a contract, the terms of which are left to the discretion of the state and the tribe. Likewise, since IGRA provides a procedure should the state decide not to negotiate even the mere question of whether the state should negotiate at all is subject to discretion. Thus, both of these facets of IGRA's compacting process demonstrate that the governors must use their discretion; accordingly, under the first exception to the *Ex parte Young* doctrine, the governors retain their Eleventh Amendment sovereign immunity.

Second, if a suit in reality is against the state itself, the *Ex parte Young* doctrine is inapplicable. *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 101-02, 104 S.Ct. 900, 908-09, 79 L.Ed.2d 67 (1984). IGRA uniformly addresses itself to "the State"; not once does it impose duties or responsibilities on a particular officer of the state (e.g., the governor, the legislature, etc.). Even the district court's

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14 The only case to disagree is *Spokane,* 790 F.Supp. at 1062-63. There, the court focused on the need for a forum in which the tribe could air its grievances. The need for a forum, however, does not provide a federal court with the power to override state officials' constitutionally mandated sovereign immunity. Federal court jurisdiction is subject to and limited by the dictates of the Eleventh Amendment, and one judge's desire to give an aggrieved party a remedy does not enlarge it.

injunctive relief powers are limited to ordering "*the State* and the Indian Tribe to conclude" a compact. § 2710(d)(7)(B)(iii) (emphases added). In addition, IGRA mandates that *the State* negotiate, conclude, and abide by the Tribal-State compact. It is apparent that these suits are not against officials in an attempt to force them to follow federal law; rather, the suits are against the states for failing to negotiate a compact in good faith. As a result, the doctrine of *Ex parte Young* does not apply.

Unless one of the three exceptions — consent, abrogation, or *Ex parte Young* — applies, the Eleventh Amendment serves as a jurisdictional bar and precludes federal court adjudication over these suits. As we have found that none of the exceptions is applicable to IGRA, these cases must be dismissed for lack of subject-matter jurisdiction.

V.

As a result of our holding that the federal courts do not have jurisdiction to reach the issues brought by the tribes in these two suits, the procedures found in §§ 2710(d)(7)(A)(i) and (B)(i)-(vi) necessarily fail when an unconsenting state refuses to consent to suit.[15]

The final question we must resolve is whether all provisions for state involvement in class III gaming also fail, as the tribes contend. We hold that they do not. IGRA contains an explicit severability clause. § 2721; and we find no "strong evidence" to ignore that plain congressional directive. *See Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 686, 107 S.Ct. 1476, 1481, 94 L.Ed.2d 661 (1987). Nevertheless, we are left with the question as to what procedure is left for an Indian

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15 A state may consent to suit, in which case these provisions remain in full force. *See, e.g., Rumsey Indian Rancheria of Wintun Indians v. Wilson,* No. Civ-S-92-812 GEB, 1993 WL 360652 (E.D. Cal. July 20, 1993), in which defendants waived their Eleventh Amendment immunity.

tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and the tribe, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02.

VI.

The decision of the United States District Court for the Southern District of Florida in *Seminole Tribe of Florida v. Florida,* No. 92-4652, is reversed; the case is remanded so that the district court may dismiss the suit. The decisions of the United States District Court for the Southern District of Alabama in *Poarch Band of Creek Indians v. Alabama,* No. 92-6244, are affirmed.

IT IS SO ORDERED.

BLACK, Circuit Judge, specially concurring.

I concur in the result.

APPENDIX B

SEMINOLE TRIBE OF FLORIDA,
Plaintiff,

v.

STATE OF FLORIDA, Lawton Chiles,
Governor of the State of Florida,
Defendants.

No. 91-6756-CIV

United States District Court,
S.D. Florida

June 18, 1992

ORDER

MARCUS, District Judge.

THIS CAUSE is before the Court on Defendant's Motion to Dismiss on Eleventh Amendment Grounds, filed December 16, 1991. For the following reasons, the motion is denied.

I. BACKGROUND

Plaintiff, the Seminole Tribe of Florida (the "Tribe") is a federally recognized Indian tribe whose headquarters are located in Broward County, Florida. The Tribe commenced this action pursuant to the Indian Gaming Regulatory Act, 25 U.S.C.§ 2701 *et seq.* ("IGRA"), to remediate the alleged failure of the State of Florida to conduct good faith negotiations regarding certain gaming activities to be conducted on the Tribe's land, after State-Tribe compact negotiations failed to yield an agreement. According to the Tribe, "the State and its Governor have refused to enter into any negotiation for inclusion of such gaming in a tribal-state compact, [and have accordingly] violated [IGRA's] requirement of good faith negotiation." Compl. at ¶ 24. The Defendants assert that they have in fact entered into good faith negotiations with the Tribe, but maintain that those negotiations were unavailing since the gaming activities at issue are prohibited under Florida law. In addition, the Defendants have moved to dismiss the action pursuant to the Eleventh Amendment to the United States Constitution, arguing that Congress does not have the power constitutionally to enforce the "good faith" requirement of the compact process by explicitly providing the Tribe a judicial remedy against the State.

II. LEGAL FRAMEWORK

A. Indian Gaming Regulatory Act

The Indian Gaming Regulatory Act was enacted by Congress primarily "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments..." 25 U.S.C. § 2702(1). IGRA divides Indian gaming into three distinct classes. Class I gaming "means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals

as a part of, or in connection with, tribal ceremonies or celebrations." *Id.* at § 2703(6). "Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes" and is not subject to the provisions of IGRA. *Id.* at § 2710(a)(1). Class II gaming includes bingo, pull-tabs, lotto, punch boards, tip jars and other similar games, *id. at* § 2703(7)(A)(i), and certain non-banking card games (not including blackjack and baccarat), *id.* at §§ 2703(7)(A)(ii); 2703(B)(i). Class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes," but is subject to the provisions of IGRA, *id.* at § 2710(a)(2), including oversight by National Indian Gaming Commission, established within the Department of Interior. *Id.* at § 2704(a).

Class III gaming is "all other forms of gaming that are not class I gaming or class II." *Id.* at § 2703(8). "Class III gaming activities shall be lawful on Indian lands only if such activities are...located in s State that permits such gaming for any purpose by any person, organization, or entity...." *Id.* at § 2710(d)(1). IGRA further provides that

> [a]ny Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, *shall* request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, *the State shall negotiate with the Indian tribe in good faith to enter into such a compact.*

Id. at § 2710(d)(3)(A) (emphasis added). Finally, IGRA mandates that

> [t]he United Sates district courts shall have jurisdiction over...any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for

> the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith...

Id. at § 2710(d)(7)(A)(i). Notwithstanding the express terms of Section 2710, Defendants argue that any such suits brought to remediate a State's alleged failure to negotiate in food faith are barred by the Eleventh Amendment.

B. Eleventh Amendment

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The scope of the Amendment has been extended beyond the literal text to also bar suits against a State brought but one of its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 21, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Thus, as the United States Supreme Court has recently observed:

> Despite the narrowness of its terms since *Hans v. Louisiana* we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; [and] that the judicial authority in Article III is limited by this sovereignty...

Blatchford v. Native Village of Noatak, ____ U.S.____, ____, 111 S.Ct. 2578, 2581 115 L.Ed.2d 686 (1991) (citation

omitted). Three exceptions to the Amendment exist: (1) a State may consent to suit in federal court, or waive its immunity to such suits, either expressly or impliedly; *see id.;* (2) Congress may, when it possesses the power, abrogate the States' immunity; *see Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13-23, 109 S.Ct 2273, 2280-86, 105 L.Ed.2d 1 (1989); and (3) state officials may under certain circumstances be sued, in their official capacities, to obtain prospective relief. *See Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Against this framework, we proceed to evaluate Defendant's Motion to Dismiss.

III. ANALYSIS

A. Abrogation

The Tribe's central argument in opposition to the Motion to Dismiss is that Congress, in enacting IGRA, abrogated the State's Eleventh Amendment immunity.[1] We hold that Congress did in fact abrogate the States' immunity when it enacted IGRA, and, despite case authority to the contrary,[2] further hold that, pursuant to the Indian Commerce

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1 The Tribe also argues that the State has implicitly waived its immunity, either inherently in the "plan of convention", *see Blatchford*, ___ U.S. at ___, 111 S.Ct. at 2581, or constructively by the State's acceptance of the benefits of IGRA, *see Parden v. Terminal Railway*, 377 U.S. 184, 192-93, 84 S.Ct. 1207, 1212-13,12 L.Ed.2d 233 (1964). Since the tribe has not strenuously pursued either "waiver" theory, and since we reach our decision on purely "abrogation" principles, we need not address the issues raised by these arguments except insofar as they may bear upon Congress' power to abrogate.

2 *See Sault St. Marie Tribe of Chippewa Indians, et al. v. State of Michigan*, No. 90-611, 1992 WL 71384, at *4-5 (W.D.Mich. Mar. 27, 1992); *Spokane Tribe of Indians v. State of Washington*, 790 F.Supp. 1057, 1059-61 (E.D.Wash. 1991); *Poarch Band of Creek Indians v. State of Alabama*, 776 F.Supp. 550, 557 (S.D.Ala.1991).

Clause, Congress plainly had the constitutional power to abrogate.[3]

1. Statutory Language

At the outset, the United States Supreme Court has held that

> Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.

See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 105 S.Ct. 3142, ___, 87 L.Ed.2d 171 (1985); *see also Blatchford*, ___ U.S. at ___, 111 S.Ct. at 2584; *Dellmuth v. Muth*, 491 U.S. 223, 226, 109 S. Ct. 2397, 2399, 105 L.Ed.2d 181 (1989). In the instant case, the relevant portion of IGRA provides:

> The United States district court shall have jurisdiction over...any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith....

25 U.S.C. § 2710 (d)(7)(A)(i). It is beyond peradventure that, in expressly providing for federal jurisdiction over claims brought by Indian tribes against States to compel good faith negotiations under IGRA (or to remedy the lack of such negotiations), Congress made its intention to abrogate the States' immunity in this context "unmistakably clear in the language of the statute." *See Atascsadero*, 473 U.S. at 242,

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3 Both the Indian and Interstate Commerce Clauses are found in the same delegation of legislative authority, which gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes..." U.S. Const. art. I, § 8, cl. 3.

105 S. Ct. at 3147. Indeed, the State of Florida concedes as much. *See* Def.Mem. at 14 (There is little doubt by that IGRA's attempted abrogation of state immunity is clear enough to do so if Congress has the power to abrogate in this situation.). Moreover, every court to squarely consider this precise issue has concluded that the language in Section 2710 is "unmistakably clear." *See Sault St. Marie tribe of Chippewa Indians, et al. v. State of Michigan*, No. 90-611, 1992 WL 71384, at *4 (W.D.Mich. Mar. 27, 1992) ("IGRA demonstrates specific Congressional intent that state be subject to suit in federal courts based upon violations of IGRA. This Court finds that the Act is a clear statement of waiver of sovereign immunity." (emphasis in original)); *Poarch Band of Creek Indians v. State of Alabama*, 776 F.Supp. 550, 557 (S.D.Ala. 1991) ("[T]his Court has little doubt but that IGRA's attempted abrogation of state immunity is clear enough to do so if Congress has the power to abrogate in this situation.... It is difficult to imagine a clearer statement of Congress' intent to subject states to lawsuits in the federal courts."). Accordingly, we find that IGRA, on its face, abrogates the States' Eleventh Amendment immunity. That does not end the inquiry, however.

2. Congressional Power to Abrogate

A more difficult question is whether, notwithstanding its manifest intent to do so, Congress had the power to abrogate the States' immunity in the context at issue here. Given Congress' plenary authority over Indian relations, explicitly noted in the text of the Constitution at Article I, § 8, cl. 3, and the uniquely federal issues raised when such authority is exercised, considered in conjunction with the principles enunciated by the Supreme Court in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), we conclude that Congress, when acting pursuant to the

Indian Commerce Clause, has the power to abrogate the States' immunity.

We begin by observing that the Indian Commerce Clause of the Constitution provides that "Congress shall have power...to regulate Commerce...with the Indian Tribes." U.S. Const. art I, § 8, cl.3. Congressional power over Indian affairs is plenary. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S. Ct. 1698, 1715-16, 104 L.Ed.2d 209 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs...."); *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234-35, 105 S.Ct. 1245, 1251-52, 84 L.Ed.2d 169 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."(citing The Federalist No. 42)); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980) ("Congress has broad power to regulate tribal affairs under the Indian Commerce Clause...."); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al., v. Voigt*, 700 F.2d 341, 361 (7th Cir.) ("Congress has plenary authority over Indian affairs. This power is rooted in...the Indian commerce clause...." (citation omitted)), *cert. denied*, 464 U.S.805, 104 S.Ct.53, 78 L.Ed.2d 72 (1973); *Agua Caliente Band of Mission Indians v. County of Riverside*, 306 F.Supp. 279, 282 (C.D.Cal.1969) ("The nature of Congressional power in Indian matters is paramount and plenary."), *aff'd*, 442 F.2d 1184 (9th Cir.1971), *cert. denied*, 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972).

In *Worcester v. Georgia*, 31 U.S. (6 Per.) 515, 8 L.Ed. 483 (1832), Chief Justice Marshall, writing for the High Court, observed that

> [the Articles of Confederation] gave the United States in congress assembled the sole and exclusive

> right of "regulation the trade and managing all the affairs with the Indians, not members of any of the states; provided, that the legislative power of any state within its own limits be not infringed or violated."
>
> * * *
>
> The correct exposition of this [section of the Articles of Confederation] is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restriction on their free actions; the shackles imposed on this power, in the [Article of Confederation], are discarded.

31 U.S. at 558-59. *See also United States v. City of Salamanca,* 27 F.Supp. 541, 543 (W.D.N.Y.1939) ("Any doubt as to whether under the Articles of Confederation certain rights over the Indians were reserved to the states was removed by the adoption of the Constitution."); The Federalist No. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961) ("The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation...."). And in *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), a unanimous Supreme Court opined:

> Resolution of the instant issue [of whether an Indian employment preference violates the Due Process Clause of the Fifth Amendment] turns on the unique federal status of Indian tribes under federal law and upon the plenary power of

> Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.

417 U.S. at 551-52, 94 S.Ct. at 2483.[4] It is thus abundantly clear that issues pertaining to Indian affairs are uniquely federal, and that in regulating such affairs *vis-a-vis* the States, congressional authority is plenary.

Moreover, it has repeatedly been observed that Congress may abrogate the States' immunity when it acts pursuant to a plenary grant of authority plainly embodied in the textual framework of the Constitution. *See, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. at 15, 109 S.Ct. at 2281-82; *Hutto v. Finney*, 437 U.S. 678, 693-94, 98 S.Ct. 2565, 2574-75, 57 L.Ed.2d 522 (1978); *Richard Anderson Photography v. Brown*, 852 F.2d 114, 123-24 (4th Cir.1988) (Boyle, J., concurring in

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4 Still other courts, and a number of commentators, have acknowledged the uniquely federal nature of Indian relations, and the breadth of congressional power in that area. *See McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 168, 93 S.Ct. 1257, 1260, 36 L.Ed.2d 129 (1973) (" 'The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' " (quoting *rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989, 991, 89 L.Ed. 1367 (1945))); *James v. Watt*, 716 F.2d 71, 73-77 (1st Cir.1983) (undertaking analysis of dormant effect of Indian Commerce Clause), *cert. denied*, 467 U.S. 1209, 104 S.Ct. 2397, 81 L.Ed.2d 354 (1984); *see also* Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 U.C.L.A.L.Rev. 759 (1991) (acknowledging that "the grant of power to Congress over the Indians may be 'plenary'...in the sense that its power over interstate commerce is plenary," but arguing that both are equally restricted by the equal protection element of the Fifth Amendment); Ainsworth, *The Negative Foreign Commerce Clause: An Analysis of the Reserved Unitary Tax Issue in* Container Corporation of America v. California Franchise Tax Board, 8 B.U.J.Tax L. 65 (1990) ("it is Congress, not the states, which must fairly regulate commerce 'with the Indian tribes' ").

part and dissenting in part), *cert. denied*, 489 U.S. 1033, 109 S.Ct. 1171, 103 L.Ed.2d 229 (1989); *United States v. Union Gas Co.*, 832 F.2d 1343, 1356 (3d Cir.1987), *aff'd*, 491 U.S. 1 (1989); *Matter of McVey Trucking, Inc.*, 812 F.2d 311, 323 (7th Cir.), *cert. denied*, 484 U.S. 895, 108 S.Ct. 227, 98 L.Ed.2d 186 (1987); *Malone v. Schenk*, 638 F.Supp. 423, 426 (C.D.Ill.1985).[5] Congress' paramount and plenary authority over Indian affairs is therefore a substantial basis upon which to find congressional power to abrogate when legislation pursuant to that authority.

[5] We next turn to a consideration of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989). In *Union Gas*, the Supreme Court held that the plain language of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9601 *et seq.*, permits a suit for monetary damages against a state in federal court. 491 U.S. at 5, 109 S.Ct. at 2276. Further, a majority of the Court concluded that Congress has the power to abrogate the States' immunity when legislating pursuant to the Interstate Commerce Clause. *Id.* at 13-23, 57, 109 S.Ct. at 2280-86, 2295. Justice Brennan authored the plurality opinion of the Court on the abrogation issue, in which Justices Marshall, Blackmun, and Stevens joined. Justice White filed a separate opinion in which he concurred in the judgment and noted his agreement "that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States...." 491 U.S. at 57, 109 S.Ct. at 2295. Justice Brennan's plurality opinion

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5 We note that, in the Bankruptcy Clause context, the United States Court of Appeals for the Eleventh Circuit has expressly left open the question of congressional power to abrogate. *TEW v. Arizona State Retirement System*, 873 F.2d 1400, 1401 (11th Cir.1989) (per curiam) ("Because we hold that Congress has not expressly abrogated sovereign immunity here, we do not reach the constitutional question of whether it would have the authority to do so."(citation omitted)).

reasoned that Congress possessed such power principally by virtue of "the plenary powers granted it by the Constitution" to regulate interstate commerce, *id.* at 14-19, 109 S.Ct. at 2281-84 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 2670-71, 49 L.Ed.2d 614 (1976) (holding that Congress may abrogate States' immunity when legislating under § 5 of the Fourteenth Amendment, since its powers under that amendment are plenary)), and also, to a lesser extent, by virtue of the States' surrender of immunity in the "plan of convention" regarding matters within the ambit of the Interstate Commerce Clause.[6] *Id.*,

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6 Defendants argue that the applicability of the *Union Gas* to the instant case is undermined by the Tribe's inability to satisfy the "plan of convention" prong of that decision since no State-Tribe "mutuality" was represented in the "plan convention." We cannot agree. The plurality's "plan of convention" discussion in *Union Gas* is, in our view, more a natural extension of the "plenary power" basis of the decision than a separate requirement of mutuality, since, even when discussing the "plan of convention", the Court was primarily concerned with Congress' plenary powers in the area of interstate commerce, observing:

> It would be difficult to overstate the breadth and depth of the commerce power. It is not the vastness of this power, however, that is so important here: it is its effect on the power of the States.

491 U.S. at 20, 109 S.Ct. at 2284. (citations omitted). This is precisely the same observation advanced by the Court when analyzing Congress' plenary power in the area:

> [T]he Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States... The important point...is that the provision both expands federal power and contracts state power; that is the meaning, in fact, of a "plenary" grant of authority...

Id. at 16-17, 109 S. Ct. at 228-83.

We thus rest today's decision primarily on Congress' plenary power over Indian affairs, rather than on a "mutuality in the plan of convention" theory, for a number of reasons. First, an explication of plenary congressional power is, in our view, the central thrust of *Union Gas*, and is a proper basis on which to find congressional power to abrogate. In addition, the latter theory seemingly begs the question by presuming that the states have already ceded their sovereignty. Finally, we think, "plan of convention" cession is more properly a "waiver" argument than an "abrogation" argument, and, in the Indian affairs context, was rejected in *Blatchford*, __ U.S. at __ - __, 111 S.Ct. at 2581-83.

491 U.S. at 19-23, 109 S.Ct. at 2284-86. Since Congress clearly possesses complete and plenary authority in the area of indian affairs, which is at least as broad as Congress' interstate commerce power, *see* note 8 *infra*, we hold that Congress has the power to abrogate the States' immunity pursuant to the Indian Commerce Clause.

Defendants have rested their Eleventh Amendment argument on three recent district court opinions, *Sault Ste. Marie Tribe of Chippewa Indians, et al. v. State of Michigan*, No. 90-611, 1992 WL 71384 (W.D.Mich.1992); *Spokane Tribe of Indians v. State of Washington*, 790 F.Supp. 1057 (E.D.Wash.1991); and *Poarch Band of Creek Indians v. State of Alabama*, 776 F.Supp 550 (S.D.Ala.1991). First, Defendants observe that the district courts in both the *Sault Ste. Marie* and the *Poarch* cases expressed misgivings as to the continuing vitality of *Union Gas*, with the court in *Poarch* going so far as to conclude that,

> [b]ecause *Union Gas* is not directly on point, and with an eye toward the shaky ground on which it stands, this Court does not find the decision to be controlling. The weakness of the plurality opinion leads this Court to believe that it should not be given an expansive application...

776 F.Supp. at 558.[7] We are unpersuaded. As already noted, a majority of the Supreme Court in *Union Gas* held that

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7 *See also Sault Ste. Marie*, 1992 WL 71384, at *5 (district court settles on a "narrow reading of *Union Gas*"); *Mississippi Band of Choctaw Indians v. State of Mississippi*, No. 90-386, 1991 WL 255614, at *6 (S.D.Miss. Apr. 1, 1991) ("[T]he Court notes that is does not consider the *Union Gas* decision itself controlling precedent upon which the eleventh amendment questions at issue here could be decided. *Union Gas* dealt with congressional abrogation of state immunity through an exercise of authority under the interstate commerce clause. The instant matter involves the Indian commerce clause.").

Congress had the power to abrogate the States' immunity under the Interstate Commerce Clause; *Union gas* is binding authority on this Court. It is a mistake to simply dismiss *Union Gas* as being inapposite, especially since congressional power over both interstate and Indian commerce derives from precisely the same Constitutional clause, Article 1, § 8, cl. 3, and since its power in both areas is plenary. *See Matter of McVey Trucking*, 812 F.2d at 323 (holding that "Congress may abrogate state immunity to suit pursuant to any of its plenary powers," including the Bankruptcy Clause of Article 1, § 8, cl 4); *Peel v. Florida Department of Transp.*, 600 F.2d 1070, 1080 (5th Cir.1979) (finding authority to abrogate pursuant to Congress' war powers, and observing that "nothing in the history of the eleventh amendment, the doctrine of sovereign immunity, or the case law indicates that Congress, when acting under an [A]rticle 1, section 8 delegated power, lacks the authority to provide for federal court enforcement of private damage actions against the states"); *BV Engineering v. University of Cla., Los Angeles*, 657 F.Supp. 1246, 1248 (C.D.Cal.1987) (finding congressional power to abrogate pursuant to Article 1, § 8,cl. 8 (copyright powers), and observing that "Congress 'may abrogate state immunity to suit pursuant to any of its plenary powers'" (quoting *Matter of McVey Trucking*, 812 F.2d at 315-23)), *aff'd* 858 F.2d 1394 (9th Cir.1988), *cert denied*, 489 U.S. 1090, 109 S.Ct. 1557, 103 L.Ed.2d 859 (1989).

The Defendants also attempt to draw important distinctions between the Interstate and Indian Commerce Clauses, citing principally to *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S.Ct. 1698, 1715-16, 104 L.Ed.2d 209 (1989), where Supreme Court observed that "[i]t is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications." Indeed, the courts both *Spokane Tribe of Indians v. State of Washington*, 790 F.Supp at 1059-61, and *Poarch*, 776 F.Supp at 559, concluded from this language that it would be

inappropriate to apply theories based on one clause to the other. Again, we do not find the argument persuasive. As we noted above, congressional power over both interstate and Indian commerce derives from the same clause in the Constitution; and we are hard pressed to conclude that the congressional authority to abrogate the States' immunity in the area of interstate commerce is greater than in Indian Commerce. Indeed, Defendants here acknowledge as much at oral argument:

> THE COURT: Let me ask you a question. Is congressional authority under Article I, Section 8, dealing with the power to regulate commerce with the Indian tribes any less sweeping than the power to regulate commerce with foreign nations and among the several States?
>
> MR. GLOGAU: No, it is not.

Transcr. of Hrng. of Jan 13, 1992, at 10. Defendants nonetheless argue that Congress' power over Indian commerce is of a "very different specie" than the power over interstate commerce, and that *Union Gas* is therefore readily distinguishable, since the Indian commerce power lacks an element of "mutuality" found in the area of interstate commerce. *See id.* 491 U.S.at 10-16, 109 S.Ct. at 2278-82. This argument is unconvincing, and we conclude that, based on its paramount and plenary authority over Indian affairs, Congress' power to act pursuant to the Indian Commerce

Clause is at least as great, if not greater, than its powers under the Interstate Commerce Clause.[8] Moreover, *Cotton*

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8 *Accord Howard v. Illinois Central R. Co.*, 207 U.S. 463, 521, 28 S.Ct.141, 154-55, 52 l.Ed. 297 (1908) (Moody J. dissenting) ("There is nothing in the word of the grant [of commerce power to Congress] that permits the belief that the power is not coextensive over foreign, interstate, and Indian trade, or is anything less than the whole power which any government may properly exercise over either...."); *Wabash R. Co. v. United States, 168 F.1, 4* (7th Cir.1909) ("When the Declaration of Independence ripened into fact, the several states could have taken their separate places in the family of nations as absolutely sovereign powers, and the commerce among them would have been on the same footing as commerce "with foreign nations" and "with Indian tribes." On abandoning their "firm league of friendship" and adopting the Constitution, the states divested themselves of the power to regulate interstate commerce as completely as they did of the power to regulate foreign commerce, and transferred to the nation in equal terms the power to regulate both. To the extent that there is a difference between the power of Congress over interstate commerce and over foreign commerce, it comes not from any difference in the grants, but from the fact that other provisions of the Constitution which may limit the exercise of power over interstate commerce may have no application to foreign commerce."); Ainsworth, *supra* note 4 ("First, Indian Commerce Clause analysis is structured differently than Interstate Commerce Clause analysis. It proposes a tripartite balancing of unequal interests (tribal, state, and federal) rather than a binary balancing of constitutionally equal interest (two similarly situated taxpayers in the same or different states). Second, under the Indian Commerce Clause, there is a presumption against state authority to tax Indian-value without express Congressional approval; whereas under the Interstate Commerce Clause, there is a presumption in favor of any non-discriminatory state taxing scheme which has not been expressly disapproved of by Congress. Finally, under the Indian Commerce Clause, it is the quantitative weight of the burden imposed on Indian Commerce that is the significant question; whereas under the Interstate Commerce Clause, it is the equal distribution of tax burdens among taxpayers, regardless of the absolute amount of the overall burden, that matters."); Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts,* 56 U.Chi.l.Rev. 671 (1989) ("[T]he 'Indian commerce clause could be read as expansively as the Interstate commerce clause.' Under such a reading, the power over Indian tribes may be more formal than real." (quoting Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self Government,* 33 Stan.L.Rev. 979, 997 (1981))).

Petroleum does not undercut this conclusion, since that decision goes on to note:

> In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, *the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.*

490 U.S. at 192, 109 S.Ct. at 1715-16 (emphasis added).[9]

Finally, Defendants rely on *Blatchford* in concluding that Congress lacked the power to abrogate.[10] This reliance is misplaced, we think, since *Blatchford* is primarily a "waiver" case, and its concerns over a lack of "mutuality of...concession," ___ U.S. at ___ - ___, 111 S.Ct. at 2581-83, are properly limited to that context. But even if, as Defendants assert, the "waiver" principles enunciated in *Blatchford* can be said to speak to Congress' power to abrogate-and we think they do not-the lack of State-Indian mutuality is a matter of relatively minor importance. First, Congress' plenary power over the uniquely federal area of Indian affairs is the primary basis on which we rest today's decision. Second, we are not persuaded that a lack of mutuality between the States and the Indian nations is a compelling deficiency, since there did in fact exist a mutuality between the federal government-in which plenary power to regulate Indian affairs was vested-and the States. And although the lack of State-Indian mutuality may undercut the argument that

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9 At all events, *Cotton Petroleum* is of limited help here since the issue there was whether Indian Tribes could be treated as States for tax apportionment purposes.

10 The *Spokane Tribe* and *Saulte Ste. Marie* courts also relied on *Blatchford* in reaching the same conclusion.

the States *waived* their immunity to any and all suits by Indian tribes, the importance of that want of mutuality is diminished when a suit is brought pursuant to explicit congressional authorization, since the linchpin of abrogation must be the nature of the power pursuant to which Congress raised the Eleventh Amendment barrier. Furthermore, to the extent that *Blatchford* does expressly discuss abrogation, that discussion never reaches the issue of congressional power, since the Court concluded that Section 1362 of Title 28 did not contain "unmistakably clear" language evincing Congress' intent to abrogate.[11] ___ U.S. at ___,111 S.Ct. at 2586. Thus, *Blatchford* is wholly silent on the principal issue raised here of congressional power to abrogate, and as such is readily distinguishable. Accordingly, it is

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss is DENIED.

DONE AND ORDERED.

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11 That Section provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1362. Notably absent from Section 1362 is language specifically referencing the States, as is present in the statute conferring jurisdiction in the instant case, 25 U.S.C. § 2710(d)(7)(A)(i).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 92-4652

SEMINOLE TRIBE OF FLORIDA,
Plaintiff-Appellee,

versus

STATE OF FLORIDA; LAWTON CHILES,
Governor of the State of Florida,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
Before: TJOFLAT, Chief Judge, BLACK, Circuit Judge, and JOHNSON, Senior Circuit Judge.
PER CURIAM:
(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), The Suggestion(s) of Rehearing En Banc and DENIED.
( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in

regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Gerald B. Tjoflat
CHIEF JUDGE

Filed: U.S. Court of Appeals
Eleventh Circuit
April 6, 1994
Miguel J. Cortez, Clerk

APPENDIX D

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give
Number of Case
and Names of
Parties

April 28, 1994

MEMORANDUM TO COUNSEL OR PARTIES:
RE: 92-6244 Poarch Band of Creek Indians
v. State of AL
DC DKT No.: 91-00757 CA-AH-M

MANDATE STAYED TO AND INCLUDING July 5, 1994

The court has this day granted a stay of the mandate to the date shown above. If during the period of the stay there is filed in this court a Notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue forthwith. *See* Fed.R.App.P.41.

The Clerk of the Supreme Court has requested the clerks of the federal courts of appeal to retain the record on appeal until the Supreme Court requests that it be transmitted. Parties will be advised when this occurs. Accordingly, please refrain from routinely requesting transmittal of the record. *See* Supreme Court Rule 19.1.

A copy of this court's opinion (or Rule 36-1 decision), the judgment, and any order on rehearing should be attached as an appendix to any petition for writ of certiorari (or jurisdictional statement) filed. *See* Supreme Court Rules 21(k), 15(j).

Sincerely,

s/ Miguel J.Cortez
MIGUEL J. CORTEZ, Clerk

Reply to: Wardell Lovelace
(404)331-6147

This letter also applies to consolidated case no. 92-4652.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-4652

SEMINOLE TRIBE OF FLORIDA,
Plaintiff-Appellee,

versus

STATE OF FLORIDA; LAWTON CHILES,
Governor of the State of Florida,
Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of Florida

ORDER:

Appellee's motion to stay issuance of the mandate pending petition for writ of certiorari is granted.

s/ Gerald B. Tjoflat
CHIEF JUDGE

Filed: U.S. Court of Appeals
Eleventh Circuit
April 28, 1994
Miguel J. Cortez, Clerk

APPENDIX E

SEMINOLE TRIBE OF FLORIDA, Plaintiff,

v.

STATE OF FLORIDA, Lawton Chiles, Governor of the State of Florida, Defendants.

No. 91-6756-CIV-MARCUS.

United States District Court, S.D. Florida.

Sept. 22, 1993.

Bruce Rogow, Ft. Lauderdale, FL, for plaintiff.

Jonathan Glogau, Tallahassee, FL, for defendant.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S

MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

MARCUS, District Judge.

THIS MATTER comes before the Court pursuant to the Plaintiff, SEMINOLE TRIBE OF FLORIDA's ("the Tribe"), Motion for Summary Judgement and the Defendants, the STATE OF FLORIDA and LAWTON CHILES's ("the State"), Motion for Summary Judgement, both of which were filed on October 9, 1992, and pursuant to the Tribe's Supplemental Motion for Summary Judgment, filed on March 19, 1993.

The Tribe brought this action under the Indian Gaming Regulatory Act, 28 U.S.C. §§ 2701-21, 18 U.S.C. §§ 1166-68 ("IGRA"). The Tribe alleges that the State has failed to

negotiate in good faith by refusing to include the Tribe's request to conduct certain forms of machine or computer-assisted gaming and casino type gaming in the negotiation of a Tribal-State compact governing gambling on Tribal lands. The Tribe claims that such gaming is permitted by the State and is therefore a mandatory subject of negotiations under the IGRA. The State maintains, however, that, while it has agreed to negotiate for other types of gaming, it need not negotiate for machine or computer-assisted gaming or casino type gaming precisely because those specific types of gaming are not permitted by the State. The Court heard oral argument on the cross-motions for summary judgment on December 11, 1992. In addition, by Order of January 5, 1993, the Court granted the Tribe's Motion to Re-Open Discovery on the issue of the State's treatment of foreign flag vessels which operate gambling cruises from Florida ports. The Tribe filed its Supplemental Motion for Summary Judgment based on the additional discovery on March 19, 1993, the State filed its response on April 6, 1993, and the Tribe filed its reply on April 12, 1993, at which time the issues were fully joined. Based on our thorough review of the case and the record, it is hereby

ORDERED AND ADJUDGED that the State's Motion for Summary Judgment is GRANTED and the Tribe's Motion for Summary Judgment and Supplemental Motion for Summary Judgment are DENIED for the reasons detailed at some length below.

I.

The following facts have been stipulated to by the parties in their Joint Pretrial Stipulation. On January 29, 1991, the Tribe asked the State to commence negotiations pursuant to the IGRA for a compact governing the Tribe's proposed operation of certain forms of gambling on Tribal lands. On March 4, 1991, the Tribe submitted a proposed contract

providing for Tribal operation of poker, and machine or computer-assisted games which duplicate poker, bingo, pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo. By letter of May 24, 1991, the State, through the Governor's General Counsel, J. Hardin Peterson, Jr., agreed to negotiate poker and other games allowed by Fla.Stat.Anno. § 849.085 (West Supp.1993), but rejected all of the Tribe's other compact requests. The letter set forth the State's preliminary legal position on the scope of games believed by the State to be subject to compact negotiations and also contained suggestions for issues to be negotiated related to regulatory matters. On June 18, 1991, Seminole Chairman James Billie requested Florida Governor Lawton Chiles's personal involvement in compact negotiations. The Chairman submitted additional games that the Tribe asserted met the objections set forth in the May 24 letter from Peterson, and, at the same time, requested expansion of negotiations to include casino gambling. On June 25, 1991, the Tribe submitted a ten-page legal memorandum to the State in support of the lawfulness of the proposed compact. (Joint Pretrial Stipulation at 4, PP 1-5).

On August 22, 1991, representatives of the Tribe met with State representatives to discuss the Tribe's compact request. The State agreed to negotiate concerning poker and other card games, raffles, and parimutuel wagering on dog and horse racing and jai alai. In response to questions from the State representatives, there was some discussion of how the Tribe would conduct these games if a compact were approved. The State, however, refused to negotiate a compact covering any machine or computer-assisted gaming which the State contended would violate Fla.Stat.Anno. §§ 849.15 and 849.16 (West 1976 & Supp.1993). Specifically, the State refused to negotiate a compact covering any form of casino gambling. (Joint Pretrial Stipulation at 4-5, P 6).

On September 17, 1991, the State and the Tribe met to continue discussions. The State expressed its willingness to negotiate a compact for games permitted under the interpretation of IGRA set forth in its September 13 letter. The Tribe decided not to continue negotiations at that time and subsequently filed the instant lawsuit. By letter dated September 14, 1992, the Tribe contacted the State requesting that negotiations be resumed. (Joint Pretrial Stipulation at 5, PP 6.1-6.2).

II.

The standard to be applied in reviewing a summary judgment motion is stated unambiguously in Rule 56(c) of the Federal Rules of Civil Procedure: The judgment sought shall be rendered forthwith if the pleading, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). Thus, summary judgment may be entered only where there is no genuine issue of material fact. Moreover, the moving party has the burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

In applying this standard, the Eleventh Circuit has explained: In assessing whether the movant has met this burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. Adickes, 398 U.S. at 157, 90 S.Ct. at 1608; Marsh, 651 F.2d at 991. All reasonable doubts about the facts should be resolved in favor of the non-movant. Casey Enterprises, Inc. v. American Hardware Mut. Ins. Co., 655 F.2d 598, 602 (5th Cir.1981). If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. Marsh, 651 F.2d at 991; Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co.,

420 F.2d 1211, 1213 (5th Cir.1969). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. Lighting Fixture & Elec. Supply Co., 420 F.2d at 1213. If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. Impossible Electronics, 669 F.2d at 1031; Croley v. Matson Navigation Co., 434 F.2d 73, 75 (5th Cir.1970). Moreover, the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. Adickes v. S.H. Kress & Co., 398 U.S. at 160, 90 S.Ct. at 1609-10; Marsh, 651 F.2d at 991. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleading or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. Brunswick Corp. v. Vineberg, 370 F.2d 605, 611-12 (5th Cir.1967). See Dalke v. Upjohn Co., 555 F.2d 245, 248-49 (9th Cir.1977). Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368-69 (11th Cir.1982). See also Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502 (11th Cir.1985), cert. denied, 475 U.S. 1107 (1986).

The United States Supreme Court has provided significant additional guidance as to the evidentiary standard which trial courts should apply in ruling on a motion for summary judgment: [The summary judgment] standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. Brady v. Southern R. Co., 320 U.S. 476, 479-80, 64 S.Ct. 232, 234, 88 L.Ed. 239 (1943). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Court further stated that "[t]he mere existence of a scintilla of evidence in support of the position

will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Id. at 252. In determining whether this evidentiary threshold has been met, the trial court "must view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. Id. at 254. If the non-movant in a summary judgment action fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding for the non-movant, summary judgment may be granted. Id. at 254-55.

In another case, the Supreme Court has declared that a non-moving party's failure to prove an essential element of a claim renders all factual disputes as to that claim immaterial and requires the granting of summary judgment: In our view, the plain language of Rule 56(c) mandates the entry of summary judgment...against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (emphasis added).

The parties agree that there are no genuine issues of material fact in dispute and that the matter may properly be disposed of on cross-motions for summary judgment. (Joint Pretrial Stipulation at 13). The parties' respective claims will be evaluated against this standard.

III.

Congress enacted the IGRA in 1988. In its opening text, Congress recognized that: (1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;...(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands; (4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity. 25 U.S.C. § 2701. The purpose of the IGRA is: (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and (3) to declare that the establishment of independent Federal authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue. 25 U.S.C. § 2702.

Basically, the IGRA divides gaming into three classes. Class I gaming "means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with,

tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class I gaming is subject to the exclusive jurisdiction of the Indian tribes and is not subject to the regulatory provisions of the IGRA. 25 U.S.C. § 2710(a)(1).

Class II gaming "means the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)...including (if played at the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and games similar to bingo, and card games that (I) are explicitly authorized by the laws of the State or (II) are not explicitly prohibited by the laws of the State and are played at any location in the State," provided those card games are played under the State laws and regulations governing hours of operation and limitations on wagers or pot sizes. 25 U.S.C. § 2703(7)(A). Congress explicitly excluded "any banking card games, including baccarat, chemin de fer, or blackjack, or...electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" from Class II. 25 U.S.C. § 2703(7)(B). The tribes have jurisdiction over Class II gaming, subject to the requirements of the IGRA and the oversight of the National Indian Gaming Commission. 25 U.S.C. § 2710(b).

Class III gaming "means forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). The parties agree that the games at issue here (i.e., casino gaming and machine or computer-assisted games) are Class III games. The IGRA states: Class III gaming activities shall be lawful on Indian lands only if such activities are — (A) authorized [by an approved Tribal] ordinance or resolution..., (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is effect. 25 U.S.C. § 2710(d). In order to engage in Class III gaming activities on tribal land, a tribe

must first "request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(3)(A). The IGRA requires the State to negotiate with the Indian tribe in good faith upon receipt of the tribe's request. Id.

Immediately before passage of the IGRA, in the case of California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S.Ct. 1083 (1987) the Supreme Court established the standard for evaluating requests by Indian tribes to conduct gaming activities on tribal lands. In Cabazon, the State of California objected to the Indian tribe's operation of bingo games on tribal property. The state argued that the tribe's bingo operations violated a state penal statute which, while it did not prohibit bingo, imposed prize limits and required the games to be "operated and staffed by members of designated charitable organizations who may not be paid for their services." Cabazon, 480 U.S. 205, 107 S.Ct. at 1086. As noted by the Supreme Court, California was a "Public Law 280" state, meaning that Congress had granted California jurisdiction over specified areas of Indian country within its borders. Section 2 of Pub.L. 280 granted California "broad criminal jurisdiction over offenses committed by or against Indians within all Indian country" within California, but Section 4 of Pub.L. 280 granted the state a more limited form of civil jurisdiction. Cabazon, 480 U.S. at 207-08, 107 S.Ct. at 1087. Based on this difference in the congressional grant of jurisdiction, the Supreme Court held: when a State seeks to enforce a law within an Indian reservation under the authority of Pub.L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court. Cabazon, 480 U.S. at 208, 107 S.Ct. at 1088.

In Cabazon, the Supreme Court adopted a prohibitory/regulatory distinction to determine whether the state law governing the conduct at issue fell within Pub.L. 280's grant of criminal jurisdiction or not. The Court cautioned that the mere fact that "an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub.L. 280." 480 U.S. at 211, 107 S.Ct. at 1089. Rather, the touchstone is "whether the conduct at issue violates the State's public policy." 480 U.S. at 209, 107 S.Ct. at 1088. After reviewing the scope of legally permissible gambling activities within California, the Court concluded that "California regulates rather than prohibits gambling in general and bingo in particular." 480 U.S. at 211, 107 S.Ct. at 1089. The Court was not presented with, and thus did not address, the situation where a state adopted a regulatory attitude toward some forms of gambling which would fall under the IGRA's rubric of Class III gaming (e.g., parimutuel betting and a state lottery), but prohibited the specific Class III activities proposed by a tribe.

Review of the Cabazon decision is basic when interpreting the IGRA, as Congress incorporated the Cabazon decision into both the statutory language and legislative history of the IGRA. The Senate Report accompanying the IGRA makes explicit reference to the Cabazon decision in discussing 25 U.S.C. § 2710(b)(1)(A)'s requirement that Class II gaming on Indian property take place only if "located within a State that permits such gaming for any purpose by any person, organization, or entity." The Senate Report offered the following guidance to courts construing that phrase: the Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notable

by the Supreme Court in Cabazon.... The phrase "for any purpose by any person, organization or entity" makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming. S.Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3076, 3082. While the Senate Report referred to the phrase as found at 25 U.S.C. § 2710(b)(1)(A), the identical phrase is repeated at 25 U.S.C. § 2710(d)(1)(B) regarding Class III activities. It is a general principle governing statutory construction that when a word or phrase is used in more than one section of an act, and the meaning is clear as used in one place, " 'it will be construed to have the same meaning in the next place'." United States v. Nunez, 573 F.2d 769, 771 (2nd Cir.) (citation omitted), cert. denied, 98 S.Ct. 2828 (1978). We therefore agree with the Tribe that the legislative history relating to the phrase as found in the provision governing Class II gaming is instructive regarding the meaning of the language found in the provision governing Class III gaming. See also, Mashantucket Pequot Tribe v. State of Conn., 913 F.2d 1024 (2nd Cir.1990) (reaching same conclusion regarding applicability of legislative history). Coupling the Senate Report with the express language of 25 U.S.C. § 2701(5) supra, we conclude that Congress intended the prohibitory/regulatory analysis found in Cabazon to be consistent with and to be applied to the IGRA provisions covering both Class II and Class III gaming.

In the instant case, the Tribe argues that the "permits such gaming" provision of the IGRA (i.e., the phrase incorporating Cabazon's regulatory/prohibitory distinction) refers to the "generic class of gaming permitted in the State." (Plaintiff's Motion for Summary Judgment at 18) (emphasis in original). Under the Tribe's theory, by allowing one form of Class III gaming, the State has evinced a public policy

which is regulatory in nature toward all forms of Class III gaming. Following the Tribe's argument, because the State allows parimutuel facilities and the state lottery, all other forms of Class III gaming, such as casinos and machine and computer-assisted games, become mandatory subjects for negotiation of the Tribe-State compact. The State's admitted refusal to include those forms of Class III activities in the compact negotiation would therefore constitute a violation of the good faith requirement imposed upon the State by the IGRA. While we agree that the Cabazon standard should be used in the interpretation of the IGRA Class III provisions, we cannot accept the Tribe's broad assertion that the State's permission of specific Class III gaming activities places all Class III activities on the table as subject to negotiation.

In support of its position, the Tribe primarily relies on three recent cases interpreting the IGRA: United States v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358 (8th Cir.1990); Mashantucket Pequot Tribe v. State of Connecticut, 913 F.2d 1024 (2nd Cir.), cert. denied, 111 S.Ct. 1620 (1991); and Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin, 770 F.Supp. 480 (W.D.Wis.1991) (Lac du Flambeau II). Contrary to the Tribe's argument, a close reading of these cases does not support its position. Each court considering the Cabazon regulatory/prohibitory distinction in relation to the IGRA has conducted a broad review of the state's public policy toward gambling, and, in each case, the court has determined that the specific gaming activity proposed by the Indian tribe was in fact permitted by the state.

The Sisseton-Wahpeton case arose in the context of Class II gaming. The Indian tribe in that case opened a blackjack enterprise on its South Dakota reservation. The tribe argued, first, that its blackjack operation was grandfathered in as a Class II activity by specific IGRA provisions not relevant to the instant case. The tribe further argued that its operations satisfied the IGRA requirement that the

activities take place in a state "that permits such gaming for any purpose by any person, organization or entity." This is the precise phrase in both the Class II and Class III provisions which is at issue in the instant case. In interpreting that phrase, the court stated that it revealed a congressional intent to permit a "particular gaming activity...if the state law merely regulated, as opposed to completely barred, that particular gaming activity." 897 F.2d at 365 (emphasis added). After concluding that South Dakota permitted commercial card games including blackjack, albeit with wage limits and other constraints, the court found that the IGRA's requirement was met and the Indian tribe could lawfully conduct its blackjack operation pursuant to the IGRA.

In Mashantucket, the United States Court of Appeals for the Second Circuit addressed a similar issue in the context of the IGRA provisions governing Class III activities. The Indian tribe sought to operate casino-type games of chance on its reservation in Connecticut. The state refused to negotiate a compact for these gaming activities. The district court found that Connecticut statute specifically authorized certain nonprofit organizations to hold Las Vegas nights. Based on this, the district court granted summary judgment in favor of the tribe. In upholding the district court's decision, the Court of Appeals for the Second Circuit stated: the district court concluded, after a careful review of pertinent Connecticut law regarding "Las Vegas nights," that Connecticut "permits games of chance, albeit in a highly regulated form. Thus such gaming is not totally repugnant to the State's public policy...." ...This ruling means only that the State must negotiate with the Tribe concerning the conduct of casino-type games of chance at the Reservation. 913 F.2d at 1031-32. (emphasis added).

Finally, in Lac du Flambeau II, the court found that the Wisconsin electorate amended their state's constitution to allow the state to operate a lottery. Based in part on an

opinion by the Wisconsin Attorney General, the court concluded that Wisconsin no longer prohibited games involving prize, chance, and consideration, and ruled that all games falling within that category must be included in the compact negotiation. Thus, the court's ruling was limited to the specific category of games, albeit a broad category, no longer prohibited by Wisconsin. To some extent, the court in Lac du Flambeau II utilized a different interpretation of Cabazon than the one outlined above. For example, the court observed: If the policy is to prohibit all forms of gambling by anyone, then the policy is characterized as criminal-prohibitory and the state's criminal laws apply to tribal gaming activity. On the other hand, if the state allows some forms of gambling, even subject to extensive regulation, its policy is deemed to be civil-regulatory and it is barred from enforcing its gambling laws on the reservation. This approach is broader than the one employed by the Supreme Court in Cabazon and other courts which have faced the same question and, to the extent the court in Lac du Flambeau II based its conclusion on that analysis, we decline to follow its lead.[1]

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1 The Tribe has also argued that the Lac du Flambeau II decision controlled the ultimate outcome of the instant case. The Tribe asserted that the electorate's amendment of the Florida Constitution to permit a state-run lottery converted the State's public policy toward all forms of Class III gaming to one which is wholly regulatory in nature. We disagree. First, the Tribe's argument is premised on the notion that the Court may look only to the State's Constitution, and not to its statutory law or expressions by its populace, to discern the State's public policy toward gambling. The Tribe has cited nothing and we can find no support for that proposition. Second, as noted above, the thrust of Cabazon and its progeny requires a particularized inquiry into the proposed gambling activity (in this case, casino gambling and machine or computer-assisted gaming). For example, in Cabazon, where California ran a state lottery and permitted parimutuel betting, the lower courts and the Supreme Court looked at the state's public policy regarding bingo, the specific gambling activity at issue. Thus, we do not agree that Lac du Flambeau II dictates the outcome of the instant case, without a review of the State's public policy toward gambling in general and its public policy toward the specific gaming activities in question.

In sum, we can find no convincing support in these cases for the Tribe's suggestion that a state's public policy permitting individual Class III activities is somehow equivalent to permitting all Class III gaming activities. Indeed, two other courts recently reached the same conclusion regarding the "permits such gaming" language and Class III gaming activities. See, Cheyenne River Sioux Tribe v. State of South Dakota, et. al., 1993 WL 316042, No. 93-1224/1521 (8th Cir. August 23, 1993) (Court upheld district court's ruling that state need not include traditional keno in compact negotiations when state only permitted video keno because the " 'such gaming' language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit.") and Rumsey Indian Rancheria of Wintun Indians, et al. v. Governor Pete Wilson, et al., Case No. CIV-S-92-812-GEB at 16, n. 16 (E.D.Cal. July 16, 1993) ("This court has found no authority for the proposition that a state's public policy construed as permitting a single Class III game must be found to permit all Class III gaming activities.") Thus, we look at the state's public

policy toward the specific gaming activities proposed by the tribes.[2]

The Tribe has argued alternatively that Florida in fact permits precisely those types of Class III gaming activities which it proposes to operate on Tribal lands. The parties agree that the State explicitly permits parimutuel betting and the state lottery, both of which are Class III games. The Joint Pretrial Stipulation describes in detail these games. For example, there are thirty-five parimutuel facilities throughout the State, including dog and horse racing tracks and jai alai frontons. The State also permits simulcast and intertrack betting at the parimutuel facilities. Simulcast involves the transmission of an out-of-state race into Florida or an in-state race out of Florida for betting purposes.

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2 In its motion for summary judgment, the State argued that the different language prefacing the Class II and Class III provisions should be the focus of the Court's analysis of the IGRA. The relevant portions of the IGRA state: An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if — ...(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity,...and: Class III gaming activities shall be lawful on Indian lands only if such activities are — ...(B) located in a State that permits such gaming for any purpose by any person, organization, or entity,...25 U.S.C. § 2710(b)(1) and (d)(1) (emphasis added). The State argues that the use of the term "gaming activities" rather than "gaming" indicates a congressional intent that courts treat Class III as a particularized, rather than a generic group of activities, thereby requiring an activity-by-activity review of the proposed tribal gaming. At least one court has concluded that this difference in prefatory language does not create a meaningful distinction between Class II and Class III under the IGRA. See, Mashantucket Pequot Tribe v. State of Connecticut, 913 F.2d 1024, 1030 n. 6 (No significance should be accorded to the "modest difference" between the two introductory sections). Because we have concluded that the application of the Cabazon standard requires a court to examine the State's public policy regarding the specific activities proposed by the Tribe, we need not address the State's argument that the prefatory language creates an important distinction between the IGRA's Class II and Class III provisions. We add, however, that the purported distinction the State would draw between "gaming" and "gaming activities" appears illusory.

Intertrack betting involves the transmission of a race from one Florida parimutuel facility to another for betting purposes. The total amount bet at the State's thirty-five facilities has been 1.6 billion dollars for the past several years. (Joint Pretrial Stipulation at 5-6, PP 7- 11).

In addition to accepting bets placed at parimutuel facility windows staffed by facility employees, fifteen facilities use SAMS. SAMS are automated machines which permit a bettor to enter his bet by inserting money, vouchers, or credit cards into the machine, thereby enabling him to select the number or combination he wishes to purchase. A ticket is issued showing those numbers. Those numbers may be selected by bettors who handicap races or those who choose numbers or combinations without handicapping the race. A ticket showing a winning number or combination of numbers will entitle the holder to receive money in exchange for the ticket. (Joint Pretrial Stipulation at 6, P 12).

Florida's state-wide lottery has a total in annual ticket sales of approximately two billion dollars. There are approximately 12,000 retail lottery sites throughout the State, and each retail site is operated by one or more persons trained by the State to operate the machine terminals which are installed at the sites. The on-line lottery games are Cash 3, Play 4, Fantasy 5, and Lotto. Each of these games uses machine terminals installed at the retail site. To play, a player selects his numbers either by marking the numbers of his choice or by marking the Quick Pick box on the play slip, a three by nine inch card which is inserted in the machine terminal. If Quick Pick is marked, the machine selects the numbers. In either event, the chosen numbers are transmitted to and recorded by the lottery's main computer in Tallahassee and the retail terminal prints out the lottery ticket containing the selected numbers. Alternatively, a player can verbally select either the numbers of his choice or the Quick Pick option to be entered into the

machine by hand. Retailers and employees are permitted to operate machine terminals for their own purchases of lottery tickets. The winning numbers are chosen by an air blowing device which ensures the random selection of white numbered balls. A ticket showing a winning combination of numbers entitles the holder to receive money in exchange for the ticket. (Joint Pretrial Stipulation at 6- 7, PP 13-16).

It is clear, therefore, that some Class III gaming is "not totally repugnant to" Florida's public policy, Mashantucket, 913 F.2d at 1031, as the State allows, although with regulations, parimutuel betting and the Florida lottery. The Tribe, however, argues that the State already permits precisely those Class III activities in which it wishes to engage. Specifically, the Tribe points to the State's alleged permission of charity casino nights, gambling cruises operated by foreign flag vessels out of Florida ports, and the use of computer or machine-assisted gaming in conjunction with parimutuel betting and the State lottery. The Tribe asserts that the State's permission of these activities indicates a regulatory, rather than a prohibitory, public policy toward these games, thereby making them mandatory subjects of negotiation between the Tribe and the State. Before addressing these arguments, it is helpful to examine Florida's public policy toward other types of Class III activities in order to place the Tribe's argument in its proper context.

The Florida penal code prohibits now, and has for many years barred a broad range of gambling activities. Fla.Stat.Anno. § 849.08 (West 1976) prohibits gambling in general, and provides: Whosoever plays or engages in any game at cards, keno, roulette, faro or other game of chance, at any place, by any device whatever, for money or other thing of value, shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083. Other sections of the Florida penal code prohibit various activities associated with or attendant to gambling. For

example, § 849.01 prohibits the keeping of a gambling house,[3] § 849.02 makes an individual acting as a "servant, clerk, agent, or employee" of a person in violation of § 849.01 guilty of the same offense,[4] § 849.03 prohibits the renting of a house or room for gambling purposes,[5] § 849.11 prohibits plays at games of chance by lot,[6] § 849.14 prohibits betting on the outcome of contest of skill,[7] and § 849.04 makes it

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3 Fla.Stat.Anno. § 849.01 (West 1976) states: Whoever by himself, his servant, clerk or agent, or in any other manner has, keeps, exercises or maintains a gaming table or room, or gaming implements or apparatus, or house, booth, tent, shelter or other place for the purpose of gaming or gambling or in any place of which he may directly or indirectly have charge, control or management, either exclusively or with others, procures, suffers or permits any person to play for money or other valuable thing at any game whatever, whether heretofore prohibited or not, shall be guilty of a felony of the third degree, punishable as provided in § 775.082, or § 775.084.

4 Fla.Stat.Anno. § 849.02 (West 1976) states: Whoever acts as servant, clerk, agent, or employee of any person in the violation of § 849.01 shall be punished in the manner and to the extent therein mentioned.

5 Fla.Stat.Anno. § 849.03 (West 1976) states: Whoever, whether as owner or agent, knowingly rents to another a house, room, booth, tent, shelter or place for the purpose of gaming shall be punished in the manner and to the extent mentioned in § 849.01.

6 Fla.Stat.Anno. § 849.011 (West 1976) states: Whoever sets up, promotes or plays at any game of chance by lot or with dice, cards, numbers, hazards or any other gambling device whatever for, or for the disposal of money or other thing of value or under the pretext of a sale, gift, or delivery thereof, or for any right, share or interest therein, shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

7 Fla.Stat.Anno. § 849.14 (West 1976) states: Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of man or beast, or whoever receives in any manner whatsoever any money or other thing of value staked, bet or wagered, or offered for the purpose of being staked, bet or wagered, by or for any other person upon any such result, or whoever knowingly becomes the custodian or depositary of any money or other thing of value so staked, bet, or wagered upon any such result, or whoever aids, or assists, or abets in any manner in any of such acts all of which are hereby forbidden, shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

illegal to allow a minor or mentally incompetent individual to gamble.[8] Section 849.05 makes the discovery of gambling devices prima facie evidence that the location where they were found is kept for the purposes of gambling.[9] Section 849.07 prohibits the use of billiards tables for gambling purposes.[10] In addition, § 849.231(1) prohibits the manufacture, sale,

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8 Fla.Stat.Anno. § 849.04 (West Supp.1993) states: Whoever being the proprietor, owner or keeper of any E.O., keno or pool table, or billiard table, wheel of fortune, or any other game of chance, kept for the purpose of betting, willfully and knowingly allows any minor or any person who is mentally incompetent or under guardianship to play at such game or to bet on such game of chance or whoever aids or abets or otherwise encourages such playing or betting of any money or other valuable thing upon the result of such game of chance by any minor or any person who is mentally incompetent or under guardianship shall be guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084. For the purpose of this section, a "mentally incompetent person" is one who because of mental illness, mental retardation, senility, excessive use of drugs or alcohol, or other mental incapacity is incapable of either managing his property or caring for himself or both.

9 Fla.Stat.Anno. § 849.05 (West Supp.1993) states: If any of the implements, devices or apparatus commonly used in games of chance in gambling houses or by gamblers, are found in any house, room, booth, shelter or other place it shall be prima facie evidence that the said house, room, booth, shelter or other place where the same are found is kept for the purpose of gambling.

10 Fla.Stat.Anno. § 849.07 (West 1976) states: If any holder of a license to operate a billiard or pool table shall permit any person to play billiards or pool or any other game for money, or any other thing of value, upon such tables, he shall be deemed guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

purchase, or possession of gambling devices,[11] § 849.26 provides that all gambling debts or contracts are void,[12]

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11 Fla.Stat.Anno. § 849.231(1) (West 1976) states: Except in instances when the following described implements or apparatus are being held or transported by authorized persons for the purpose of destruction, as hereinafter provided, and except in instances when the following described instruments or apparatus are being held, sold, transported, or manufactured by persons who have registered with the United States Government pursuant to the provisions of Title 15 of the United States Code, sections 1171 et seq., as amended, so long as the described implements or apparatus are not displayed to the general public, sold for use in Florida, or held or manufactured in contravention of the requirements of 15 U.S.C. § 1171 et seq., it shall be unlawful for any person to manufacture, sell, transport, offer for sale, purchase, own, or have in his possession any roulette wheel or table, faro layout, crap table or layout, chuck-a-luck wheel, bird cage such as used for gambling, bolita balls, chips with house markings, or any other device, implement, apparatus, or paraphernalia ordinarily or commonly used or designed to be used in the operation of gambling houses or establishments, excepting ordinary dice and playing cards.

12 Fla.Stat.Anno. § 849.26 states: All promises, agreements, notes, bills, bonds or other contracts, mortgages or other securities, when the whole or part of the consideration if for money or other valuable thing won or lost, laid, staked, betted or wagered in any gambling transaction whatsoever, regardless of its name or nature, whether heretofore prohibited or not, or for the repayment of money lent or advanced at the time of a gambling transaction for the purpose of being laid, betted, staked or wagered, are void and of no effect; provided, that this acts shall not apply to wagering on pari-mutuels or any gambling transaction expressly authorized by law.

and § 849.12 provides for the forfeiture to the State of money and prizes won through illegal gambling.[13]

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13 Fla.Stat.Anno. § 849.12 (West 1976) states: All sums of money and every other valuable thing drawn and won as a prize, or as a share of a prize, or as a share, percentage or profit of the principal promoter or operator, in any lottery, and all money, currency or property of any kind to be disposed of, or offered to be disposed of, by chance or device in any scheme or under any pretext by any person, and all sums of money or other thing of value received by any person by reason of his being the owner or holder of any ticket or share of a ticket in a lottery, or pretended lottery, or of a share or right in any such schemes of chance or device and all sums of money and other thing of value used in the setting up, conducting or operation of a lottery, and all money or other thing of value at stake, or used or displayed in or in connection with any illegal gambling shall be forfeited, and may be recovered by civil proceedings, filed, or by action for money had and received, to be brought by the Department of Legal Affairs or any state attorney, or other prosecuting officer, in the circuit courts in the name and on behalf of the state; the same to be applied when collected as all other penal forfeitures are disposed of.

Certain games which would otherwise be Class III games are exempted from this statutory scheme. These are limited, however, to games played in residences for less than $10,[14]

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14 Fla.Stat.Anno. § 849.085 (West Supp.1993) states: (1) Notwithstanding any other provision of law, it is not a crime for a person to participate in a game described in this section if such game is conducted strictly in accordance with this section. (2) As used in this section: (a) "Penny-ante game" means a game or series of games or poker, pinochle, bridge, rummy, canasta, hearts, dominoes, or mahjongg in which the winnings of any player in a single round, hand, or game do not exceed $10 in value. (b) "Dwelling" means residential premises owned or rented by a participant in a penny-ante game and occupied by such participant or the common elements or recreational areas or a condominium or mobile home park of which a participant in a penny-ante game is a unit owner, or the facilities of an organization which is tax exempt under § 501(c)(7) of the Internal Revenue Code. The term "dwelling" also includes a college dormitory room or the common recreational area of a college dormitory or a publicly owned community center owned by a municipality or county. (3) A penny-ante game is subject to the following restrictions: (a) The game must be conducted in a dwelling. (b) A person may not receive any consideration or commission for allowing a penny-ante game to occur in his dwelling. (c) A person may not directly or indirectly charge admission or any other fee for participation in the game. (d) A person may not solicit participants by means of advertising in any form, advertise the time or place of any penny-ante game, or advertise the fact that he will be a participant in any penny-ante game. (e) A penny-ante game may not be conducted in which any participant is under 18 years of age. (4) A debt created or owed as a consequence of any penny-ante game is not legally enforceable. (5) The conduct of any penny-ante game within the common elements or recreation area of a condominium of mobile home park or the conduct of any penny-ante game within the dwelling of an eligible organization as defined in subsection (2) or within a publicly owned community center owned by a municipality or county creates no civil liability for damages arising from the penny-ante game on the part of a condominium association, mobile home owner's association, dwelling owner, or municipality or county or on the part of a unit owner who was not a participant in the game.

drawings by chance held by charitable organizations,[15] and

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15 Fla.Stat.Anno. § 849.0935 (West Supp.1993) states: (1) As used in this section, the term: (a) "Drawing by chance" or "drawing" means an enterprise in which, from the entries submitted by the public to the operator of the drawing, one or more entries are selected by chance to win a prize. The term "drawing" does not include those enterprises commonly known as "matching," "instant winner," or "preselected sweepstakes," which involve the distribution of winning numbers, previously designated as such, to the public. (b) "Operator" means an organization qualified under 26 U.S.C. § 501(c)(3), and its agents, officers, or employees, which promotes, operates, or conducts a drawing by chance. (2) The provision of § 849.09 shall not be construed to prohibit an organization qualified under 26 U.S.C. § 506(c)(3) from conducting drawings by chance, provided the operator has complied with all applicable provisions of chapter 496. (3) All brochures, advertisements, notices, tickets, or entry blanks used in connection with a drawing by chance shall conspicuously disclose: (a) The rules governing the conduct and operation of the drawing. (b) The full name of the organization or operator, and its principal place of business. (c) The source of funds used to award cash prizes or to purchase prizes. (d) The date, hour, and place where the winner will be chosen, unless the brochures, advertisements, notices, tickets, or entry blanks are not offered to the public more than 3 days prior to the drawing. (4) It is unlawful for any operator who, pursuant to the authority granted by this section, promotes, operates, or conducts a drawing by chance: (a) To design, engage in, promote, or conduct any drawing in which the winner is predetermined by means of matching, instant win, or preselected sweepstakes or otherwise or in which the selection of the winners is in any way rigged; (b) To require an entry fee, payment, proof of purchase, or contribution as a condition of entering the drawing or of being selected to win a prize; (c) To arbitrarily remove, disqualify, disallow, or reject any entry or to discriminate in any manner between entrants who gave contributions to the operator and those who did not give such contributions; (d) To fail to promptly notify, at the address set forth on the entry blank, any person whose entry is selected to win, of the fact that he has won; (e) To fail to award all prizes offered in the manner and at the time stated; and (f) To print, publish, or circulate literature or advertising material used in connection with the drawing which is false, deceptive, or misleading. (5) Any operator who engages in any act or practice in violation of this section is guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083. However, any operator or other person who sells or offers for sale in this state a ticket or entry blank for a raffle or other drawing by chance, without complying with the requirements of paragraph (3)(d), is guilty of a misdemeanor of the second degree, punishable by fine only as provided in § 775.083. (6) This section does not apply to the state lottery operated pursuant to chapter 24.

promotions in connection with the sale of consumer goods.[16]

These wide-ranging statutory prohibitions are not the only evidence of the State's public policy toward gambling. The State's voters have twice rejected referenda which would have legalized casino gambling. In 1986, the most recent referendum, the Florida electorate approved the State lottery by a two-to-one margin but rejected casino gambling by the same margin. (Defendants' Motion for Summary Judgment, Ex. # 3). In addition, the Florida Legislature has failed to pass several bills over the past few years which would have permitted charity casino night activities. (Joint Pretrial Stipulation at 9, P 20).

As noted above, the permission of parimutuel betting and the operation of the State lottery indicates that some Class III activities are not repugnant to the State. However, both the Legislature and the State electorate have evinced their unwillingness to allow all but a few forms of Class III

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16 Fla.Stat.Anno. § 849.094 (West Supp.1993) states in pertinent part: (1) As used in this section, the term: (a) "Game promotion" means, but is not limited to, a contest, game of chance, or gift enterprise, conducted within or throughout the state and other states in connection with the sale of consumer products or services, and in which the elements of chance and prize are present. However, "game promotion" shall not be construed to apply to bingo games conducted pursuant to § 849.0931. (b) "Operator" means any person, firm, corporation, or association or agent or employee thereof who promotes, operates, or conducts a game promotion, except any charitable nonprofit organization. (2) It is unlawful for any operator: (a) To design, engage in, promote, or conduct such a game promotion, in connection with the promotion or sale of consumer products or services, wherein the winner may be predetermined or the game may be manipulated or rigged so as to: 1. Allocate a winning game or any portion thereof to certain lessees, agents, or franchisees; or 2. Allocate a winning game or any part thereof to a particular period of the game promotion or to a particular geographic area; (b) Arbitrarily to remove, disqualify, disallow, or reject any entry; (c) To fail to award prizes offered; (d) To print, publish, or circulate literature or advertising material used in connection with such game promotions which is false, deceptive, or misleading; or (e) To require an entry fee, payment, or proof of purchase as a condition of entering a game promotion.

activities and those which are allowed are subject to strict regulation. With this in mind, we turn now to the Tribe's argument that the State in fact permits precisely those Class III activities about which the State refused to negotiate.

The Tribe first argues that the failure to prosecute casino nights held by some Florida charities reflects the State's permission of casino gambling. The following facts are not in dispute. Over the past three years, certain Florida charities have conducted casino or Las Vegas nights. These events include the use of blackjack tables, roulette wheels, crap tables, and other casino-like equipment. The events' patrons make a contribution to the sponsoring charitable organization and are given casino-like chips to be used to play the available casino-style games. At the end of the evening, the players may then use their chips to purchase or bid on gifts which have been donated to or purchased by the charity. (Joint Pretrial Stipulation at 8, P 17). The Tribe submitted a list under seal of twenty-nine casino nights held during the period 1990-1992. Of these events, fifteen were held in Broward County, four in Dade County, six in Palm Beach

County, and one in both Collier and Martin Counties.[17] On March 23, 1993, the Tribe submitted a list of four more such events held in Broward County.

Additionally, The Florida Attorney General's office has had ten to fifteen calls about charitable casino nights within the past four years, asking about events where there would be casino-like gambling. The Attorney General's ffice received information regarding names of firms offering to sponsor these events and passed that information to the appropriate local states' attorneys offices. The Attorney General's office never learned if any action was taken at the local level and did not follow up to determine if anything illegal was discovered. (Joint Pretrial Stipulation at 8, P 18).

On July 22, 1991, the Florida Attorney General wrote to each of the twenty State Attorneys informing them of the Tribe's compact request and stating: [The Tribe] may also attempt to establish full fledged gambling casinos. The Seminoles justify these proposed activities in part on the

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17 To obtain this list, the Tribe initially filed a motion to compel, and later a renewed motion to compel, against the promoter of these events. The Court referred these motions to United States Magistrate Judge Ted E. Bandstra to resolve. On November 6, 1992, Magistrate Judge Bandstra granted the Tribe's renewed motion to compel. Subsequently, the Tribe and the events' promoter reached an agreement whereby the list of the events was filed under seal with the Court on November 27, 1992, pursuant to the Joint Stipulation of Resolution of Seminole Tribe of Florida's Motion to Compel and Plaintiff's Renewed Motion to Compel Testimony and Production from [the Promoter] and Withdrawal of Motion. In the Tribe's Notice of Filing Under Seal a List of 29 Charitable Las Vegas Night Events accompanying the actual list, the Tribe indicated that in his order of November 6, 1992, Magistrate Judge Bandstra's found that the promoter faced no threat of prosecution based on the disclosure of the list of casino night events. We assume that the Tribe points this out to support its contention that a State Attorney's failure to prosecute casino night events constitutes permission of casino gambling. The promoter filed an objection to the characterization of Magistrate Judge Bandstra's order. We specifically disregard any suggestions in the Tribe's Notice, and take notice only of the contents of the list filed under seal.

fact that "casino nights" or "Las Vegas nights" are openly conducted by various charitable and non-profit organizations in Florida despite the clear prohibition against such activity outlined in Chapter 849, Florida Statutes (1989). Of great concern to me is the perception among some members of the law enforcement community, including prosecutors, that Casino Night or Las Vegas Night activities are lawful. This is simply not true. The people of Florida have repeatedly rebuffed attempts to legitimize casino type gambling. On at least two occasions prior to the State Attorney General's letter, State Attorneys had written letters providing opinions that permit casino or Las Vegas nights under certain circumstances. The above quoted letter from the Attorney General was prompted by one of those State Attorney letters. The Attorney General received responses from three other State Attorneys agreeing with and supporting the letter's statement that casino night activities are illegal. (Joint Pretrial Stipulation at 8, P 18). The Attorney General's office, both present and past, has consistently taken the position, through formal and informal opinions, that casino night activities are illegal. (Joint Pretrial Stipulation at 8, P 18.1). The parties have stipulated that the casino night activities described above are not generally prosecuted due to budgetary and manpower constraints and the exercise of prosecutorial discretion on the part of state attorneys. (Joint Pretrial Stipulation, P 21).

The Tribe has argued that the failure to prosecute charitable casino nights by local state attorneys is analogous to the situation in Mashantucket supra. We disagree. The Tribe is correct that the Mashantucket case centered on the operation of casino night activities by charitable organizations in Connecticut. However, in that case, Connecticut, unlike Florida, officially sanctioned the operation of casino nights by way of statute. In contrast, the Tribe relies only on the discretionary decision not to prosecute sporadic casino night activities to evince the State's permission of

casino gambling activities, notwithstanding the State legislature's clear prohibitory declaration in the promulgation of its penal code.

The prosecutorial discretion involved in the enforcement of crimes is certainly one component in a state's public policy. The capacity to discern public policy, however, from the discretionary exercise of prosecutorial power is exceedingly difficult. The undisputed facts evidencing a strong public policy against casino-type activities cannot be substantially undermined by occasional and sporadic decisions made on a local level not to prosecute a discrete casino night conducted by a charity, due to manpower, financial constraints, and higher criminal priorities. First, the State Attorney General has emphasized repeatedly and over extended periods of time, in formal and informal opinions, that these activities remain illegal,[18] and the Florida penal code is plain and unambiguous on its face prohibiting these activities. Indeed, the parties have stipulated that the "Attorney General's office, both present and past, has

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18 For example, in response to the question of whether a "Law Vegas" party staged by a fraternal organization for the benefit of a crippled children's home was legal, the State Attorney General responded: The gambling laws make no exceptions in favor of fraternal orders of persons who participate in gambling schemes operated by such orders, even when the ultimate beneficiary is a worthy one. Said laws bear upon everybody equally and take no cognizance of who is to benefit from the operation of gambling schemes. Therefore your question is answered in the negative because in my opinion the described "Las Vegas" party would violate the criminal laws of Florida. Op.Att'y.Gen. 056-20 (1956). (Exh. I, Defendants' Motion for Summary Judgment). As noted above, the State Attorney General recently reaffirmed this position in a letter sent out to all State Attorneys. This letter, written in reaction to two opinions from local state attorneys that such activities were legal, states: Of great concern to me is the perception among some members of the law enforcement community, including prosecutors, that Casino Night or Las Vegas Night activities are lawful. This is simply not true. The people of Florida have repeatedly rebuffed attempts to legitimize casino type gambling. (Joint Pretrial Stipulation at 9, P 18).

consistently taken the position through formal and informal opinions that casino night activities are illegal." (Joint Pretrial Stipulation at p. 9, P 18.1).

Second, the State electorate and its representatives have continuously rejected attempts to legalize casino gambling. (Joint Pretrial Stipulation at 9, P 20). For example, the State's voters twice rejected referenda to legalize casino gambling. Most recently, in 1986, a proposed amendment to the Florida Constitution to allow casino gambling in hotels of 500 rooms or more was defeated by a two-to-one margin. (Defendant's Motion to Summary Judgment, Ex. 9). In addition, charity casino nights have also been the subject of several bills in the Florida legislature, and none of the bills have passed. (Joint Pretrial Stipulation at 9, P 20).

Finally, desuetude has been rejected as a general theory of legislation by the Florida Supreme Court. In State v. Egan, 287 So.2d 1 (Fla.1973), the defendant was charged with the common-law offense of nonfeasance. The defendant was indicted pursuant to a Florida statute which explicitly adopted English common law in relation to crimes, with certain exceptions, as the law of the State. The trial court ruled that the statute in question was unconstitutional on the grounds of vagueness and obsolescence, and the Florida Supreme Court reversed. It is the Florida Supreme Court's discussion of the argument regarding the obsolescence of the state statute which is relevant to the instant case. In rejecting the argument that the infrequent use of common law crimes to prosecute individuals had caused those crimes to cease to exist, the Florida Supreme Court observed: Our answer to this line of argument is that a legislative enactment may be repealed only by further legislation and not by time or changed conditions.... Simply stated, the general rule is that a statute is not repealed by nonuse. The argument set forth in the order of the lower court may be a cogent one when addressed to the legislature, yet courts of justice

cannot and do not recognize such a policy as a basis for their decision. 287 So.2d at 7. The Tribe's argument that the failure of local prosecutors to prioritize and prosecute sporadic and apparently infrequent casino night activities converts an activity expressly prohibited by the penal code of the State into one which is permitted by the public policy of the State resembles the argument presented to and rejected by the Florida Supreme Court.

The record before the Court consists of a total of some thirty-three events held in four counties over a three year period. In a state with sixty-seven counties and more than thirteen million inhabitants, we do not believe that this evinces a public policy permitting casino gambling, especially when contrasted with the State's unambiguous penal statutes, the consistent prohibitory opinions of the State Attorney General over time, and the repeated votes of the State's electorate and its legislators prohibiting and rejecting casino gambling. The most that can be said regarding charitable casino night activities in Florida is that some State Attorneys in some counties on some occasions have chosen to prosecute other crimes as having higher priority, rather than the sporadic casino night event, based on the resources available to them. Based on the record before us, and viewing the evidence in the light most favorable to the Tribe, we do not believe that the sporadic decision to decline to prosecute the occasional casino night in a handful of Florida counties can be said to constitute the State's permission of casino gambling. The Florida Legislature has plainly pronounced the public policy of the State, the people of the State have recently spoken twice, and the State Attorney Generals have repeatedly and consistently pronounced in formal and informal opinions that such casino night activities are illegal. The overwhelming weight of the evidence presented does not support the Tribe's position.

The Tribe also points to the fact that cruise ships docked in Florida possess gambling devices and embark passengers from Florida ports for the purpose of providing casino gaming for those passengers and that this too evinces a public policy toward casino gambling which is regulatory, rather than prohibitory, in nature. Several of these ships provide only day cruises with no destination other than the high seas for gambling purposes. It is these cruises on which the Tribe grounds its argument. While Fla.Stat.Anno. § 849.231(1) (West 1976) prohibits the possession of gambling paraphernalia, the ships at issue are expressly exempted from the prohibition by Fla.Stat.Anno. § 849.231(3) (West Supp.1993). (Joint Pretrial Stipulation at 9, P 19). However, notably no gambling occurs nor is it permitted within the territorial bounds of the State.

The Tribe argues nevertheless that the State's collection of a tax on these cruises manifests a public policy of permitting casino gambling. The State collects the tax pursuant to Fla.Stat.Anno. § 212.02(1) (West Supp.1993). That statute provides in pertinent part: The term "admissions" means and includes the net sum of money after deduction of any federal taxes for admitting a person or vehicle or persons to any place of amusement, sport, or recreation or for the privilege of entering or staying in any place of amusement, sport, or recreation, including, but not limited to, theaters, outdoor theaters, shows, exhibitions, games, races, or any place where charge is made by way of sale of tickets, gate charges, seat charges, greens fees, participation fees, entrance fees, or other fees or receipts of anything of value measured on an admission or entrance or length of stay or seat box accommodations in any place where there is any exhibition, amusement, sport, or recreation... Section 212.04 provides, in pertinent part: (1)(a) It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who sells or receives anything of value by way of admissions. (b) For the exercise of such

privilege, a tax is levied at the rate of 6 per cent of sales price, or the actual value received from, such admissions, which 6 per cent shall be added to and collected with all such admissions from the purchaser thereof... Thus, the State collects a tax on these cruises pursuant to its broadly applicable admissions tax, a tax which applies to the many forms of amusement, sport, or recreation based in the State. The admissions tax is charged to customers of these cruises because these excursion tours are not considered "a transportation service." (Plaintiff's Supplemental Motion for Summary Judgment at 6). It should be observed, however, that the tax is not leveled at the gambling enterprise per se, i.e., the amount of tax collected is wholly independent of the amount of gambling, if any, done on the high seas by an individual passenger. Indeed, a passenger who does not participate in the gambling activities offered onboard pays the same admissions tax as the passenger who does participate. Moreover, the Tribe's interpretation of this tax in relation to the IGRA's requirements is overly broad. Each case interpreting the IGRA which found state permission of a Class III gaming activity presented some form of explicit legislative approval of the activity within the state's territory. The Tribe's theory would seem to place an affirmative duty on a state to eradicate means by which its citizens could legally gamble in other jurisdictions in order to demonstrate a public policy prohibiting Class III activities.[19] For the same reason, the Tribe's argument that the State's continued allowance of these cruises to use its ports must fail,

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19 A hypothetical may be illustrative. Imagine that an individual who owns casinos in New Jersey operated an airline with scheduled flights from Miami to Atlantic City for the sole purpose of bringing players to his halls. Passengers who bought their airplane tickets in Florida would pay the applicable sales tax to the State. Under the Tribe's theory, this would constitute the State's permission of gambling under the IGRA, a conclusion which is supported by neither the language of the IGRA nor the cases interpreting that statute.

especially in light of the fact that no gambling occurs within the State's boundaries. Thus, even when viewing the evidence before the Court in the light most favorable to the Tribe, we conclude that these cruises by foreign flag vessels cannot be fairly said to constitute permission of casino gambling by the State within the State and within the ambit of the IGRA.

Finally, we turn to the Tribe's argument that the State permits machine and computer-assisted gaming. The State's position is that Fla.Stat.Anno. §§ 849.15 and 849.16 (West & Supp.1993) outlaw certain machines commonly known as slot machines. Therefore, this type of machine and computer-assisted gaming need not by included in the Tribe-State compact negotiations. The Tribe asserts that the machines used at some parimutuel facilities and in the operation of the Florida Lottery fall within the definition of Fla.Stat.Anno. § 849.16 (West Supp.1993), and therefore the State "permits such gaming for any purpose by any person, organization or entity" within the meaning of 25 U.S.C. § 2710(d)(1)(B). The relevant statutes state in pertinent part: 849.16 machines or devices which come within in provisions of law defined. — (1) Any machine or device is a slot machine or device within the provisions of this chapter if it is one that is adapted for use in such a way that, as a result of the insertion of any piece of money, coin, or other object, such machine or device is caused to operate or may be operated and if the user, by reason of any element of chance or of any other outcome of such operation unpredictable to him, may: (a) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value or which may be given in trade;...849.15 Manufacture, sale, possession, etc., of coin-operated devices prohibited. — It is unlawful: (1) To manufacture, own, store, keep, possess, sell, rent, lease, let

on shares, lend or give away, transport, or expose for sale or lease, or to offer to sell, rent, lease, let on shares, lend or give away, or permit the operation of, or for any person to permit to be placed, maintained, or used or kept in any room, space, or building owned, leased or occupied by him or under his management or control, any slot machine or device of any part hereof; or (2) To make or to permit to be made with any person any agreement with reference to any slot machine or device, pursuant to which the user thereof, as a result of any element of chance or other outcome unpredictable to him, may become entitled to receive any money, credit, allowance, or thing of value or additional chance or right to use such machine or device, or to receive any check, slug, token or memorandum entitling the holder to receive any money, credit, allowance or thing of value.

In Eccles v. Stone, 183 So. 628 (Fla.1938) and Deeb v. Stoutamire, 53 So.2d 873 (Fla.1951), the Florida Supreme Court offered some guidance in the interpretation of these statutes. In Eccles, the Florida Supreme Court reviewed the history of the two statutes. In 1935, the Florida Legislature legalized "all sorts of slot machines or coin-operated gambling devices," with the provision that the vote by the majority of a county's electorate could prohibit their use within that county. 183 So. at 631. As noted by the Court, ithin two years the operation of slot machines in Florida had become so obnoxious to the citizens of this State that the people of a great majority of the counties in the State had voted overwhelmingly to prohibit the operation of all slot machine devices licensed under the 1935 Act being operated thereafter in their respective counties, and a great majority of the members of the legislature of 1937 were pledged to their constituency to enact laws which would abolish the operation of slot machines in Florida. The opposition to slot machines was the direct result of the baneful and destructive effect which the operation of those machines had had upon the morals of the people of Florida of all ages and

classes. It is a mater of common knowledge, of which we must take judicial cognizance, that the lure to play the slot machine had become so great as to undermine the morals of many and to lead to the commission of or the indulgence in vices and crime to procure the coins with which to play the machines. So the legislature of 1937 carried out the mandate of the majority of the people of the State, and the members their pledges to their constituency, to pass acts which would prohibit the operation of coin-operated gambling devices in this State and enacted Chapter 18143 [i.e., the instant statutes]. It is also a matter of common knowledge that pursuant to the passage of that act the popular slot machine with its set of pictured wheels, its alluring jackpot and its pull lever, generally known as the one-armed bandit, faded away from the public places and immediately in the places where they had stood were set up the mechanical horse races, marble pin games and other coin-operated mechanical devices, adapted and fit for fast, easy gambling; and it is a matter of common knowledge, of which we cannot plead ignorance, that these machines are generally used as gambling devices and that the gambling element is the principal lure which causes them to be played by the public. 183 So. at 631. In Deeb, the Florida Supreme Court stated that, to violate the statutes at issue in the instant case, the "element of unpredictability" must be "inherent" in the machine itself. 53 So.2d at 874. Thus, the unpredictable outcome or chance, upon which the money or prize is awarded, must be part of the machine's operation. A review of the SAMS and lottery ticket machines indicates that they do not meed this criterion.

Specifically regarding the SAMS, the description of these machines found in the Joint Pretrial Stipulation reveals that they are the automated equivalent of placing a bet at a live teller's window. Similarly, the lottery terminals operate as recording and ticketing devices, necessary in order to keep track of the individual combinations entered throughout

the state. Neither type of machine falls within the scope of the legislative intent as recounted by the Florida Supreme Court in Eccles. More generally, however, the Tribe attempts to read out of the statute the phrase "such machine...is caused to operate...and if the user, by reason or any element of chance or of any other outcome of such operation unpredictable by him, may" receive money or a thing of value. Both the statutory language and Deeb indicate that the unpredictable event or element of chance which determines the winner must be linked to the machine's operation. Thus, the winner at a parimutuel facility is determined by the dog or horse race, not by the operation of the SAMS machines. Similarly, the winner of the State Lottery is determined by the weekly drawing in Tallahassee, not by the operation of the individual lottery ticket terminals.

In support of its position, the Tribe refers to Rumsey Indian Rancheria of Wintun Indians, et al. v. Governor Pete Wilson, et al., Case No. CIV-S-92- 812-GEB (E.D.Cal. July 16, 1993). We find the Rumsey case unpersuasive as applied to the particular facts of this case. In Rumsey, the Indian tribes argued that they were "entitled to play the electronic games on Indian land regardless of whether the equipment used may be deemed illegal slot machines so long as the State sponsors an identical type of game." Rumsey at 17. Thus, the tribes in Rumsey advocated a game-by-game evaluation of the electronic games they proposed. In contrast, in the instant case, the Tribe argues that the State's alleged permission of specific machines which violate Fla.Stat.Anno. § 849.16 (West Supp.1993) make machine or computer-assisted games of any type mandatory subjects of negotiation. This parallels the Tribe's earlier argument, which we rejected, that the permission of one type of Class III activity places all types of Class III activity on the negotiation table. In addition, in Rumsey, the court observed that "State has authorized the State Lottery to operate electronic games virtually identical to the electronic games requested by the

Tribes" and that "it appears that equipment similar if not identical to that proposed by the Tribes is currently employed by the State in its electronic gaming operations." Rumsey at 18.

In the instant case, the Tribe has made no such argument and the undisputed facts compel a different conclusion. The Tribe's proposal to the State indicated that it seeks to use machine or computer-assisted games to duplicate poker, bingo, pull-tabs, lotto, punch boards, tip jars, instant bingo, or other games (Joint Pretrial Stipulation at 4, P 2), games which are clearly not identical to the SAMS and lottery ticket machines. Thus, the court's conclusion in Rumsey that the tribes should be allowed to negotiate regarding the operation of electronic games "virtually identical" to electronic games operated by the California Lottery is not apposite to the instant case on the record presented to the Court.

Based on the record before the Court, and viewing all evidence in a light most favorable to the Tribe, we conclude that the State does not permit the operation of gambling devices in contravention to Fla.Stat.Anno. §§ 495.15 and 495.16 (West 1976 & Supp.1993) and that the machine or computer-assisted games proposed by the Tribe are not mandatory subjects of negotiation under the IGRA.

In conclusion, it is the holding of the Court first that the IGRA does not require all Class III gaming activities to be included in compact negotiations merely because the State permits specific Class III gaming activities in some form; and second that, contrary to the Tribe's argument, the State does not permit those specific types of Class III gaming activities which it now seeks to include in the Tribe-State compact negotiations. Having concluded that these proposed Class III activities need not be included in the compact negotiations, we hold that the State has not violated

the IGRA's good faith requirement by refusing to include them in the negotiations. Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is GRANTED and the Plaintiff's Motion for Summary Judgment and Supplemental Motion for Summary Judgment are DENIED. It is further

ORDERED AND ADJUDGED that the Defendant shall submit a proposed order of final judgment within fifteen (15) days of the date of this Order.

DONE AND ORDERED.

APPENDIX F

Relevant portions of 25 U.S.C. § 2701, *et seq.* provide:

25 U.S.C. § 2710:

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2703

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

25 U.S.C. § 2710

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are-

(A) authorized by an ordinance or resolution that-

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian Tribe and the State under paragraph (3) that is in effect.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(7)(A) the United States district courts shall have jurisdiction over-

> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith.

. . .

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that-*

> (I) a Tribal-State compact has not been entered into under paragraph (3), and
>
> (II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court-

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures-

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(3)

No. 94-219

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

STATE OF FLORIDA, and LAWTON CHILES, Governor of Florida,

Cross-Petitioners,

vs.

SEMINOLE TRIBE OF FLORIDA,

Cross-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petition for Writ of Certiorari filed by the Seminole Tribe in No. 94-12 sets forth the statement of this case. The Respondents/Cross-Petitioners have agreed that the decision below presents conflict among the circuits and that the decision below presents "an unanswered question of importance which

should be decided by this Court." (Response to Petition for Writ of Certiorari, p. 1).

The Respondents' Cross-Petition seeks review of a single paragraph within the decision below. That paragraph opines that a state's invocation of Eleventh Amendment immunity would, under the Indian Gaming Regulatory Act, permit a Tribe to apply to the Secretary of the Interior, and allow the Secretary to prescribe regulations for the conduct of class III gaming on tribal lands. *Seminole Tribe of Florida v. State of Florida,* 11 F.3d 1016, 1029 (11th Cir. 1994) (Cross-Petitioner's Appendix A-25-26).

For the reasons set forth below, the Cross-Petition seeking review of that paragraph should be denied.

SUMMARY OF THE ARGUMENT

The Cross-Petitioners prevailed below. The judgment of the Eleventh Circuit Court of Appeals was that the Seminole Tribe's suit should be dismissed on Eleventh Amendment grounds. A prevailing party cannot seek review of a judgment which it won.

The State of Florida and its Governor seek certiorari to obtain excision of a single paragraph in the decision below. That paragraph is, even according to the State, "dicta." In addition, its language does not present any present case or controversy. Therefore, there is no basis for granting certiorari on the Cross-Petition.

REASONS FOR DENYING THE CROSS-PETITION

The State of Florida prevailed below by successfully invoking Eleventh Amendment immunity and securing dismissal, with prejudice, of the Seminole Tribe's Indian Gaming Regulatory Act (IGRA) suit. The paragraph which triggered the Cross-Petition is in Part V of the decision below:

> The final question we must resolve is whether all provisions for state involvement in class III gaming also fail, as the tribes contend. We hold that they do not. IGRA contains an explicit severability clause. § 2721; and we find no "strong evidence" to ignore that plain congressional directive. *See Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 686, 107 S. Ct. 1476, 1481, 94 L.Ed.2d 661 (1987). Nevertheless, we are left with the question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and the tribe, pursuant to 25 U.S.C. § 2710(d)(7) (B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02.

(11 F.3d at 1029, Cross-Pet. App. A-25-26).

The State characterizes the paragraph as "dicta:" "The Court's dicta in part V creates a remedy inconsistent with the plain language of the statute. . . ." (Cross-Petition, p. 15) (footnote omitted). This Court does not review "dicta." Nor does it review statements in opinions; it reviews "judgments." *Johnson v.*

DeGrandy, 114 S. Ct. 2647, 2653 n.5 (1994). Judgment was entered in favor of the State. Certiorari is not available to a party who has won the judgment below. *Public Service Commission v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939); *see also California v. Rooney*, 483 U.S. 307 (1987), precluding a winning State from claiming a loss because the Court of Appeals' analysis disturbed the State:

> Here, the judgment of the Court of Appeal was entirely in the State's favor — the search warrant which was the sole focus of the litigation was deemed valid. . . . The Court of Appeal's use of analysis that may have been adverse to the State's long-term interests does not allow the State to claim status as a losing party for purposes of this Court's review. (footnote omitted).

483 U.S. at 311; *see also Electrical Fittings Corp. v. Thomas*, 307 U.S. 241, 242 (1939):

> A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree.

Part V's "dicta" was not necessary to support the Eleventh Circuit's Eleventh Amendment decree. Thus no case supports the Cross-Petition.

The State's Cross-Petition also fails the article III, § 2, case or controversy test. Since the Secretary of the Interior has taken no action adverse to the State, the State's concerns are not ripe for review; there is no injury "fairly traceable to the [Secretary's] allegedly unlawful conduct and likely to be redressed by the

requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). A footnote in the Cross-Petition says the ". . . dicta . . . has generated applications to the Secretary of the Interior pursuant to the language of [part V of the opinion below]." (Cross-Petition at 9 n.2). But the Cross-Petition does not allege injury; it does not even suggest that any action by the Secretary is "threatened." The State's concerns are constructed on "could be's:" "The State of Florida has negotiated in good faith, but under Part V of the opinion, could be faced with regulations imposed by the Secretary of the Interior for class III gambling." (Cross-Petition at 15 n.4). *Compare California v. Rooney*:

> There are too many "ifs" in that proposition to make our review appropriate at this stage. Even if everything the prosecution fears comes to bear, the State will still have the opportunity to appeal such an order, and this Court will have the chance to review it, with the knowledge that we are reviewing a state court *judgment* on the issue. . . .

487 U.S. at 312-313. (emphasis in original, footnote omitted).

The same principle applies here. If the Secretary proposes regulations, and if the Secretary adopts regulations, and if those regulations are unacceptable to the State, then the State can seek relief, and this Court would ultimately be able to consider a federal court's judgment squarely presenting the issue.

There is no principled basis for granting review on the Cross-Petition where the Cross-Petition, the decision below, and the undisputed facts demonstrate that the Cross-Petitioners won below and are suffering no injury, other than a dislike of the "dicta" spawned by their victory.

The relief requested by the State's Cross-Petition demonstrates that its "injury" is not actual, but editorial:

> This Court should grant certiorari in this cross-petition and remand this case to the appeals court below with instructions to revise its opinion, excising the discussion in part V.

(Cross-Petition at 24.) That request sounds more like surgery than certiorari. Neither is necessary in this case.

CONCLUSION

For the foregoing reasons the Cross-Petition for Writ of Certiorari filed by the State of Florida and Lawton Chiles, Governor of the State of Florida, should be denied.

Respectfully submitted,

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Nos. 94-12, 94-35, 94-189 and 94-219

In the Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA, PETITIONER

v.

STATE OF FLORIDA, ET AL.

STATE OF ALABAMA, ET AL., PETITIONERS

v.

POARCH CREEK INDIANS

POARCH BAND OF CREEK INDIANS, CROSS-PETITIONER

v.

STATE OF ALABAMA, ET AL.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR OF FLORIDA, ET AL., CROSS-PETITIONERS

v.

SEMINOLE TRIBE OF FLORIDA

ON PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2710(d)(7), provides federal courts with jurisdiction over claims by Indian Tribes that States have failed to negotiate gaming compacts in good faith. The questions presented are:

1. Whether Congress has authority under the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, to abrogate a State's immunity from suit.

2. Whether the doctrine of *Ex parte Young* permits a suit against a state governor arising from a State's failure to negotiate an Indian gaming compact in good faith.

3. Whether, if a suit to require a State and its governor to negotiate a gaming compact is precluded by sovereign immunity, the Secretary of the Interior has statutory authority under IGRA to prescribe regulations governing Indian gaming.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1987, this Court held that neither Public Law 280 (18 U.S.C. 1162) nor any other provision of federal law authorized California to enforce its gaming laws with respect to bingo and card games conducted by Indian Tribes, because state law regulated rather than prohibited such gaming. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). That decision left much Indian gaming unregulated by the States. 94-12 Pet. App. 3a. At the same time, federal law did not provide "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. 2701(3). In an attempt to fill that void, Congress in 1988 enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701 *et seq.*

IGRA's purpose was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). Congress simultaneously sought to "shield [Indian gaming] from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. 2702(2). To fulfill those purposes, IGRA divides gaming into three classes, each of which is regulated differently.

Class I gaming, over which Indian Tribes exercise exclusive regulatory control, consists of social games for prizes of minimal value and traditional games engaged in as part of tribal ceremonies. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming consists of bingo, other games similar to bingo (when played in the same location), and non-banking card games. 25 U.S.C. 2703(7). Indian Tribes maintain regulatory jurisdiction over

class II gaming, see 25 U.S.C. 2710(a)(2), subject to the supervision of the National Indian Gaming Commission (an entity within the Department of the Interior). 25 U.S.C. 2704. An Indian Tribe may engage in class II gaming if: (1) the State in which the gaming is located "permits such gaming for any purpose by any person," (2) such gaming is not prohibited on Indian lands by federal law, and (3) the gaming is conducted pursuant to a tribal ordinance that satisfies specified statutory requirements and is approved by the Chairman of the Commission. 25 U.S.C. 2710(b).

Class III gaming, at issue here, is gaming that does not fall within class I or class II, and includes banking card games, casino games, slot machines, horse racing, dog racing, jai alai, and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. Class III gaming is lawful only if it is: (1) authorized by a tribal ordinance that satisfies the requirements in 25 U.S.C. 2710(b) for class II gaming and is approved by the Chairman of the Commission; (2) located in a State that permits such gaming; and (3) conducted in conformance with a compact between the Indian Tribe and the State. 25 U.S.C. 2710(d)(1). To facilitate the formation of a tribal-state compact, IGRA provides that, upon request by the Tribe, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. 2710(d)(3)(A).

Congress provided for judicial consideration of a Tribe's allegation that a State has failed to negotiate a tribal-state compact in good faith. Under 25 U.S.C. 2710(d)(7)(A)(i), "[t]he United States district courts shall have jurisdiction over * * * any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact * * * or to conduct such negotiations in good faith." A

Tribe may initiate such a cause of action 180 days after requesting the State to enter into negotiations. 25 U.S.C. 2710(d)(7)(B)(i). In such a suit, the Tribe must initially introduce evidence that a tribal-state compact has not been concluded and that the State did not respond to the request to negotiate or did not respond in good faith. 25 U.S.C. 2710(d)(7)(B)(ii). Once such evidence is introduced, "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith." 25 U.S.C. 2710(d)(7)(B)(ii).

If the district court finds that the State has failed to negotiate in good faith, "the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. 2710(d)(7)(B)(iii). If the parties fail to conclude a tribal-state compact within that 60-day period, the Tribe and the State each must submit a proposed compact to a mediator appointed by the district court. 25 U.S.C. 2710(d)(7)(B)(iv). The mediator then is to select the compact "which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." *Ibid.* Once the mediator submits the selected compact to the State and the Tribe, the State has 60 days in which to consent. 25 U.S.C. 2710(d)(7)(B)(v) and (vi).

If the State consents within the 60-day period to the compact selected by the mediator, the compact shall be treated as a tribal-state compact entered into by agreement pursuant to 25 U.S.C. 2710(d)(3). See 25 U.S.C. 2710(d)(7)(B)(vi). If the State does not consent, "the mediator shall notify the Secretary [of the Interior] and the Secretary shall prescribe, in consultation with the Indian tribe, procedures [for class III gaming] * * * which are consistent with the proposed compact selected by the mediator * * *, the provisions of [IGRA], and the

relevant provisions of the laws of the State." 25 U.S.C. 2710(d)(7)(B)(vii).

2. In January 1991, the Seminole Tribe of Florida requested the State of Florida to commence negotiations for a compact governing gaming operations proposed by the Tribe. 94-12 Pet. App. 44a. The State was willing to negotiate concerning card games, raffles, and pari-mutuel wagering on dog racing, horse racing, and jai alai. The State refused, however, to negotiate over any form of casino gambling. For that reason, negotiations broke down. *Id.* at 45a.

In December 1991, the Tribe filed suit in the United States District Court for the Southern District of Florida against the State and its Governor. 94-12 Pet. App. 26a. The Tribe alleged that the State had failed to conduct good faith negotiations as required by 25 U.S.C. 2710(d)(3)(A). The Florida defendants filed a motion to dismiss on the ground that the Eleventh Amendment barred federal court jurisdiction over the suit. 94-12 Pet. App. 26a, 28a. The district court denied the motion to dismiss. It held that "Congress did in fact abrogate the States' immunity when it enacted IGRA, and * * * that, pursuant to the Indian Commerce Clause, Congress plainly had the constitutional power to abrogate." 94-12 Pet. App. 30a.

3. In July 1990, the Poarch Band of Creek Indians requested the Governor of Alabama to negotiate a compact to govern class III gaming. 94-189 Cross-Pet. 4. The State offered to negotiate concerning pari-mutuel wagering on horse, dog and simulcast races, but refused to negotiate concerning casino gambling. 94-35 Pet. 6-7. An impasse in the negotiations resulted. *Ibid.*

In September 1991, the Poarch Band filed suit against the State of Alabama and its Governor in the United States District Court for the Southern District of

Alabama. 94-35 Pet. App. B6. The Alabama defendants filed a motion to dismiss based on sovereign immunity. *Id.* at B8. The district court granted that motion. The court acknowledged that "IGRA clearly expresses Congress' intention to allow states to be sued by Indian tribes in federal court." *Id.* at B31. It held, however, that "Congress does not have the power to abrogate a state's Eleventh Amendment immunity when enacting legislation pursuant to its power found in the Indian Commerce Clause." *Id.* at B36-B37. In a separate order, the district court also dismissed the Tribe's claim against the Governor on sovereign immunity grounds. *Id.* at C1-C9.

4. The court of appeals consolidated the Florida and Alabama cases for purposes of appeal. The court agreed with both district courts that "Congress intended to abrogate the states' sovereign immunity." 94-12 Pet. App. 15a. It reasoned that "unless Congress intended to abrogate the states' immunity," the grant of jurisdiction in 25 U.S.C. 2710(d)(7)(A)(i) over claims that a State has not negotiated in good faith "would be of no effect." 94-12 Pet. App. 14a-15a.

The court went on to hold, however, that Congress lacks power under the Indian Commerce Clause of the Constitution (Art. I, § 8, Cl. 3) to abrogate a State's immunity from suit. The court of appeals acknowledged that *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), held that Congress has the power under the Interstate Commerce Clause to abrogate a State's immunity from suit. 94-12 Pet. App. 18a-20a. The court concluded, however, that *Union Gas* was distinguishable for two reasons. *Id.* at 20a-22a.

First, the court noted that although Congress's "plenary powers under the Interstate Commerce Clause * * * allow Congress to place limits on the states in

order to 'maintain[] free trade among the States, * * * the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.'" 94-12 Pet. App. 21a (quoting *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989)). For that reason, the court concluded, "the unique abrogation power afforded Congress under the Interstate Commerce Clause in *Union Gas* cannot be extended to the Indian Commerce Clause." 94-12 Pet. App. 21a. Second, the court observed that "the Court has allowed federal jurisdiction over states only when the states partake in an activity typical of private individuals." *Id.* at 22a. Viewing the negotiations contemplated by IGRA as within "the typical realm of state authority," the court concluded that "the principles of federalism and sovereign immunity exemplified in the Eleventh Amendment prevent congress from abrogating the states' immunity." *Ibid.*

The court of appeals next held that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), does not permit a suit against a State's governor to require good faith negotiations under IGRA. The court found the *Ex parte Young* doctrine inapplicable because it viewed negotiation of a compact under IGRA as discretionary and because it viewed a suit against the governor under IGRA as "in reality * * * against the State itself." 94-12 Pet. App. 23a-24a. The court reasoned that IGRA "uniformly addresses itself to 'the State'; not once does it impose duties or responsibilities on a particular officer of the state." *Ibid.*

Finally, the court discussed the question of "what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit." 94-12 Pet. App. 25a. Relying on the severability clause in IGRA (25 U.S.C. 2721), the

court expressed the view that if a State pleads an Eleventh Amendment defense and the case is dismissed, the Tribe "may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state." *Ibid.* At that point, the court continued, "[t]he Secretary then may prescribe regulations governing class III gaming on the tribe's lands." *Ibid.*

Having held that sovereign immunity precluded suit under IGRA against a State or its governor without the State's consent, the court reversed the district court's decision in the Florida case and remanded with directions to dismiss the suit. 94-12 Pet. App. 25a. The court affirmed the order of dismissal in the Alabama case. *Ibid.*[1]

DISCUSSION

The tribal petitioners in Nos. 92-12 and 94-189 seek review of the court of appeals' holding that Congress lacks power under the Indian Commerce Clause to subject States to suit under the Indian Gaming Regulatory Act, 25 U.S.C. 2710(d)(7). Review of that ruling is warranted because the court of appeals has, in essence, held an Act of Congress unconstitutional, and because its decision conflicts with the decisions of three other courts of appeals that have sustained the power of Congress to provide for the type of suit at issue here.

The tribal petitioners also seek review of the court of appeals' holding that an Indian Tribe may not bring a

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[1] While the appeal from the order denying the motion to dismiss the Florida case was pending in the court of appeals, the district court granted summary judgment on the merits in favor of Florida, finding that it had negotiated in good faith. The Seminole Tribe has appealed from that judgment, but its appeal has been stayed pending the outcome of the Tribe's petition here. 94-12 Pet. App. 84a.

suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against the governor of a State arising from the State's failure to negotiate in good faith. Because a decision in the Tribe's favor on that issue might obviate the need for a resolution of the broader constitutional question, the Court should grant the Tribe's petition on the *Ex parte Young* question as well.

The state petitioners in Nos. 94-35 and 94-219 seek review of the court of appeals' expression of the view that, if a State does not consent to suit by a Tribe, the Secretary of the Interior would have authority to prescribe regulations to govern the conduct of gaming on the Tribe's Indian lands. That discussion in the opinion below is dicta, since the court ordered the case dismissed on sovereign immunity grounds, and the question does not in any event warrant plenary review at this time. We therefore suggest that the Court hold the States' petitions raising that issue pending its decision in Nos. 94-12 and 94-189.

1. a. Section 2710(d)(7)(A)(i) of IGRA provides that "[t]he United States district courts shall have jurisdiction over * * * any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact [regulating class III gaming] * * * or to conduct such negotiations in good faith." 25 U.S.C. 2710(d)(7)(A)(i). Although the court of appeals correctly interpreted this jurisdictional provision as manifesting Congress's intent to abrogate a State's immunity from suit,[2] it

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[2] Compare *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 786-788 (1991) (holding that 28 U.S.C. 1362 does not manifest a sufficiently clear congressional intent to abrogate state sovereign immunity in suit by Tribe).

concluded that Congress lacked authority under the Indian Commerce Clause to accomplish such an abrogation. Thus, the court essentially held 25 U.S.C. 2710(d)(7)(A)(i) unconstitutional.

That holding conflicts with the holdings of the Eighth, Ninth, and Tenth Circuits. All three of those courts have upheld the constitutionality of 25 U.S.C. 2710(d)(7)(A)(i), reasoning that Congress has the power under the Indian Commerce Clause to abrogate a State's immunity from suit. *Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F.3d 273, 280-281 (8th Cir. 1993); *Spokane Tribe of Indians* v. *Washington*, 28 F.3d 991, 995-997 (9th Cir. 1994), petition for cert. pending, No. 94-357 (filed Aug. 29, 1994); *Ponca Tribe of Oklahoma* v. *Oklahoma*, 37 F.3d 1422, 1427-1432 (10th Cir. 1994), petitions for cert. pending, Nos. 94-1029 & 94-1030 (filed Dec. 9, 1994). Review is warranted to resolve that circuit conflict regarding the constitutionality of Section 2710(d)(7)(A)(i).

b. The constitutionality of 25 U.S.C. 2710(d)(7)(A)(i) follows from this Court's decision in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), which sustained the power of Congress under the Interstate Commerce Clause to provide for suits against States. In light of Congress's special powers and responsibilities with respect to Indians, "Congressional power pursuant to the Indian Commerce Clause * * * cannot be less than its authority under the Interstate Commerce Clause." *Spokane Tribe*, 28 F.3d at 997.

In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), this Court held that Congress has power under Section 5 of the Fourteenth Amendment to abrogate a State's immunity from suit. The Court explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of

the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." 427 U.S. at 456. In *Union Gas*, the Court held that Congress also has authority under the Interstate Commerce Clause to abrogate a State's immunity from an action for money damages. A plurality of the Court reasoned that, "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States." 491 U.S. at 16. "It cannot be relevant," the plurality continued, "that the Fourteenth Amendment accomplishes this exchange in two steps (§§ 1-4, plus § 5), while the Commerce Clause does it in one." *Id.* at 16-17. According to the plurality, "[t]he important point, rather, is that the provision both expands federal power and contracts state power; that is the meaning, in fact, of a 'plenary' grant of authority." *Id.* at 17.[3]

It follows a *fortiori* from *Union Gas* that Congress may provide for a suit by an Indian Tribe against a State. The United States' power over Indian affairs derives from the Commerce Clause of the Constitution (Art. I, § 8, Cl. 3), the Clauses reserving the Treaty powers to the President and the Senate (Art. II, § 2, Cl. 2); and "from the necessity of giving uniform protection to a dependent people." *Williams* v. *Lee*, 358 U.S. 217, 219 n.4 (1959), citing *United States* v. *Kagama*, 118 U.S. 375 (1886). Congress's power to regulate Indian commerce is rooted

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[3] Justice White expressed his agreement with the conclusion reached by the plurality "that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States," but stated that he "d[id] not agree with much of [the plurality's] reasoning." 491 U.S. at 57 (White, J., concurring in the judgment in part and dissenting in part). Justice White did not offer any additional reasoning.

in the same Clause as its power to regulate interstate commerce, and there is no reason for concluding that its power to provide for suits against States is any less under the Indian component of that Clause than it is under the interstate component. As this Court stated in *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989), the Indian Commerce Clause confers on Congress the "plenary power to legislate in the field of Indian affairs."

Indeed, one of the key deficiencies of the Articles of Confederation was that they divided authority over Indian affairs between the States and the central government. Article IX of the Articles of Confederation provided that "[t]he United States in Congress assembled" shall have the "sole and exclusive right" of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." James Madison viewed that attempted division of sovereign authority as an "endeavor to accomplish impossibilities," because it sought "to reconcile a partial sovereignty in the Union, with complete sovereignty in the States." The Federalist No. 42, at 268-269 (C. Rossiter ed. 1961). The division of authority also proved unsatisfactory in practice, because the proviso was relied upon by Georgia and North Carolina to treat with the Indians regarding their land and other objects and thereby "to annul the power itself." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). In response to those difficulties—and to the resulting potential for individual States to undermine the security of the United States and the States' collective commitment to the Indians—a committee of the Continental Congress submitted a report in August 1787, while the Constitutional Convention was sitting.

The committee recommended that if the States did not cede the Indian territory within their borders to the United States, they should "accede to Congress's managing, exclusively, all affairs with the Cherokees, Creeks, and other independent tribes within the limits of the said states, so that Congress, in either case, may have the acknowledged power of regulating trade, and making treaties with those tribes, and of preventing on their lands, the intrusions of the white people." 4 J. Amer. Cong. 767 (Way & Gideon ed. 1823); see *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) at 559. The Framers embraced the latter solution, and, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (*Oneida II*); see also *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) at 561 ("[t]he whole intercourse between the United States and this [Indian] nation, is, by our constitution and laws, vested in the government of the United States").

c. The court of appeals acknowledged that *Union Gas* is the closest precedent, but then sought to distinguish it on two grounds. 94-12 Pet. App. 18a-22a. Neither is persuasive.

First, the court observed that the Interstate Commerce Clause and the Indian Commerce Clause have different purposes: Whereas the Interstate Commerce Clause allows Congress to place limits on the States to "maintain[] free trade among the States * * *, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." 94-12 Pet. App. 21a (quoting *Cotton Petroleum*, 490 U.S. at 192). Those different purposes, however, have no bearing on the issue in this case. In particular, they do not suggest that Congress lacks the power under the latter Clause that *Union Gas*

sustained under the former. To the contrary, Congress's unique power with respect to Indians, its authority and practice of protecting Tribes against state encroachments, and the historical and textual parallels between relations with Indian Tribes and relations with foreign nations, suggest that Congress has the same or greater power to abrogate state immunity from suit under the Indian Commerce Clause.

The court of appeals also sought to distinguish this Court's precedents on the ground that they involved situations in which Congress authorized suits against a State when a State was engaged in an activity "typical of private individuals" and "outside the typical realm of state authority." 94-12 Pet. App. 21a-22a. This Court's precedents do not support such a restricted view of Congress's power under the Clauses of the Constitution that permit it to authorize suits against States. In *Fitzpatrick*, the activity engaged in by the State—employing workers to carry out governmental functions—was within the traditional sphere of state authority. In rejecting the State's claim of immunity from suit in that case, the Court made clear that the nature of the State's activity was irrelevant to the constitutional inquiry. 427 U.S. at 452. And in *Union Gas*, the nature of the State's activity—owning a hazardous waste site—was not mentioned as a factor in the decision. The important factor in *Fitzpatrick* and *Union Gas* was that the States had ceded a portion of their traditional authority when they gave Congress the power to enforce the Fourteenth Amendment and to regulate interstate commerce. As we have explained above, the States, in adopting the Constitution, also unequivocally ceded whatever authority they previously had to regulate Indian affairs.

In any event, the court of appeals erred in characterizing state negotiations with Indian Tribes as within the traditional sphere of state authority. 94-12 Pet. App. 22a. The Constitution assigns the power to make Treaties (including those with Indian Tribes) to the national Government (Art. II, § 2, Cl. 2), and agreements by States with Tribes historically were accomplished under federal auspices. See, *e.g.*, *Oneida II*, *supra*. IGRA is consistent with that constitutional arrangement.

2. The tribal petitioners also challenge the court of appeals' holding that a suit cannot be brought under the doctrine of *Ex parte Young* against the governor of a State arising from the failure by the State to engage in good faith negotiations under IGRA. Under the doctrine of *Ex parte Young*, sovereign immunity does not preclude a suit against a state official for prospective relief designed to vindicate federal law. See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 104-106 (1984). The tribal petitioners have sought such relief here: They have each sought prospective relief to require the governor to carry out the State's obligation under federal law to negotiate a compact in good faith.

The court of appeals concluded that *Ex parte Young* was inapplicable because negotiating a compact is discretionary. 94-12 Pet. App. 23a-24a. Under IGRA, however, once a Tribe requests the State to negotiate, "the State *shall* negotiate with the Indian tribe in good faith." 25 U.S.C. 2710(d)(3)(A) (emphasis added). If the State does not do so, it can lose the opportunity to shape the scope of gaming activity that will ultimately be permitted under federal law. See 25 U.S.C. 2710(d)(7)(B)(iv) (authorizing court-appointed mediator to choose between proposals submitted by the Tribe and the State); 25 U.S.C. 2710(d)(7)(B)(vii) (authorizing the Secretary of

the Interior to prescribe gaming consistent with the compact selected by the mediator).

The court of appeals also regarded *Ex parte Young* as inapplicable because the tribal suits are, in its view, in reality against the State. 94-12 Pet. App. 24a. But the State is the real party in interest in all official capacity suits. *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *Pennhurst*, 465 U.S. at 107-109 & n.17. Under *Ex parte Young*, the state officer's failure to abide by federal law strips the officer of whatever protection from suit the State might have. *Pennhurst*, 465 U.S. at 104. Accordingly, if a suit seeks prospective relief against a state official to vindicate federal law, it is permitted under *Ex parte Young* "notwithstanding the obvious impact on the State itself." *Pennhurst*, 465 U.S. at 104.

As the court of appeals noted, IGRA, by its terms, imposes substantive and remedial obligations on the State, and not on any particular state official. 94-12 Pet. App. 24a. A State, however, can negotiate only through its officials. The obligations that IGRA places on a State can therefore readily be understood to fall on those officials who have authority under state law to negotiate on behalf of the State. Cf. *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U.S. 278, 286 (1913) ("The provisions of the [Fourteenth] Amendment * * * are addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of state power."). There is no apparent dispute in these cases that the governor is the official who has authority in both Florida and Alabama to negotiate on behalf of the State.

If the Court grants review on the question of Congress's power to abrogate the States' sovereign immunity in this setting, it should also grant review of

the question whether a suit may be brought against a governor under the doctrine of *Ex parte Young* to effectuate the compact-negotiation provisions of IGRA. The two questions involve the same statutory section, and a decision on the latter might render it unnecessary to consider the broader constitutional issues raised by the former.

3. Finally, the state petitioners present questions related to a statement in the court of appeals' opinion that if a State asserts its immunity from suit by a Tribe, the Secretary of the Interior would have authority to prescribe regulations for Indian gaming on the Indian lands of that Tribe. 94-12 Pet. App. 25a. The court's discussion of that issue, however, is dictum. Although the state petitioners assert that the court of appeals has created a remedy in favor of the Tribes (94-35 Pet. 10; 94-219 Cross-Pet. 9), the only relief ordered by the court of appeals was dismissal of the suits filed by the Tribes. 94-12 Pet. App. 25a. The court has not required the Secretary to prescribe regulations; it has not precluded the States from arguing to the Secretary that he has no authority to do so; and it has not precluded the States from later bringing a judicial challenge to any assertion of such authority by the Secretary. As Florida acknowledges (94-219 Cross-Pet. 11), what the state petitioners object to is nothing more than a "discussion" of an issue. Plenary review of that issue at this time is therefore unwarranted, even if the Court were to affirm the court of appeals' judgment dismissing these suits. Moreover, no court of appeals has expressed a contrary view on that issue—or even had occasion to do so—since the three other courts of appeals that have considered suits against States under IGRA have upheld Congress's power to authorize such suits.

We do not, however, urge the Court to deny the States' petitions outright at this stage. Plenary consideration of the sovereign immunity and *Ex parte Young* issues raised by the Tribes could conceivably lead the Court to take a different view of the proper disposition of the States' petitions when the Court renders its decision on the merits, and there is no reason for the Court to foreclose its ability to do so.

CONCLUSION

The petitions for a writ of certiorari in Nos. 94-12 and 94-189 should be granted. The petitions for a writ of certiorari in Nos. 94-35 and 94-219 should be held and disposed of as appropriate in light of the Court's decision in Nos. 94-12 and 94-189.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA, PETITIONER

v.

STATE OF FLORIDA, ET AL.

STATE OF ALABAMA, ET AL., PETITIONERS

v.

POARCH CREEK INDIANS

POARCH BAND OF CREEK INDIANS, CROSS-PETITIONER

v.

STATE OF ALABAMA, ET AL.

STATE OF FLORIDA, ET AL., CROSS-PETITIONERS

v.

SEMINOLE TRIBE OF FLORIDA

ON PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The Solicitor General, on behalf of the United States as amicus curiae, respectfully files this supplemental brief to address a threshold procedural issue that was not taken into account in our initial submission and that now leads us to suggest a different disposition of the cross-petition for a writ of certiorari filed by the Poarch Band of Creek Indians in No. 94-189.

1. These cases arise under the provision of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, that provides for a suit to be brought in federal district court arising from a State's failure to negotiate in good faith with an Indian Tribe concerning a compact to govern Class III gaming activities on the Indian country of that Tribe. See 25 U.S.C. 2710(d)(7). The Eleventh Circuit held that Congress does not have authority under the Indian Commerce Clause of the Constitution to authorize a suit by an Indian Tribe against a State, and that a Tribe cannot bring an action under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against the Governor of the State arising from the State's failure to negotiate concerning a compact. 94-12 Pet. App. 12a-24a. The Eleventh Circuit therefore ordered dismissal of the suits brought by the Seminole Tribe of Florida and the Poarch Band of Creek Indians against the State and Governor of Florida and the State and Governor of Alabama, respectively. 94-12 Pet. App. 25a. The Seminole Tribe (in its petition in No. 94-12) and the Poarch Band (in its cross-petition in No. 94-189) seek review of those holdings.

The court of appeals also expressed the view that, in the event a State raises an Eleventh Amendment defense to such a suit, the Tribe may notify the Secretary of the Interior of the State's failure to negotiate a compact, and at that point the Secretary of the Interior would have authority to promulgate regulations governing Class III

gaming on the Tribe's land. 94-12 Pet. App. 25a. The State of Florida (in its cross-petition in No. 94-219) and the State of Alabama (in its petition in No. 94-35) seek review of that portion of the court of appeals' opinion.

2. In the brief filed on December 28, 1994, we suggested that the Court grant the Tribes' petitions because the Eleventh Circuit has essentially held an Act of Congress unconstitutional, because there is a circuit conflict on the constitutional question, and because the *Ex parte Young* issue that is also raised by the Tribes is related to the issue of whether the Tribes can sue the States themselves. U.S. Br. 9-17. We further suggested, however, that the Court not grant (but instead hold) the States' petitions, because the court of appeals' discussion concerning the authority of the Secretary of the Interior if a State raises an Eleventh Amendment defense is dictum, because there is no circuit conflict on that issue, and because review would be premature in the absence of any action by the Secretary to issue such regulations. U.S. Br. 17-18.

3. In suggesting that the Court hold Alabama's petition for a writ of certiorari but grant the Poarch Band's cross-petition, we did not take into account the fact that although Alabama's petition was filed within 90 days of April 6, 1994, the date on which the court of appeals denied rehearing (see 94-12 Pet. App. 86a), the Poarch Band's cross-petition was not filed until July 29, 1994, and therefore was not timely in its own right under 28 U.S.C. 2101(c) and Rules 13.1 and 13.4 of the Rules of this Court. The Poarch Band's cross-petition was filed less than 30 days after receipt of Alabama's petition, and it therefore is timely under Rule 12.3 of the Rules of this Court. However, Rule 13.5 provides that "a cross-petition which, except for Rule 12.3, would be untimely, will not be granted unless a timely petition for a writ of

certiorari of another party to the case is granted." Accordingly, under this Court's Rules, the Poarch Band's cross-petition cannot be granted unless the Court grants Alabama's petition.

For the reasons stated above and in our initial brief (at 16-17), we continue to believe that the issue raised in Alabama's petition does not warrant plenary review by this Court, and that Alabama's petition (along with Florida's cross-petition in No. 94-219 raising the same issue) should be held and disposed of as appropriate in light of the Court's disposition of the Eleventh Amendment and *Ex parte Young* issues. If the Court chooses to hold Alabama's petition, however, the Poarch Band's cross-petition cannot, under Rule 13.5, be granted. We therefore suggest that the Court hold the Poarch Band's cross-petition in No. 94-189 as well.

The Eleventh Amendment and *Ex parte Young* issues are presented in the Seminole Tribe's certiorari petition in No. 94-12, and the Court can reach and decide those issues in that case. There accordingly is no need to grant review in the *Poarch Band* case in order to resolve those issues. If the Court should later reverse the judgment of the court of appeals in *Seminole Tribe*, it might then choose to grant the pending petition filed by Alabama and cross-petition filed by the Poarch Band, vacate the judgment of the court of appeals in the *Poarch Band* case, and remand that case to the court of appeals for further consideration in light of this Court's ruling in the *Seminole Tribe* case. If, on the other hand, the Court should later sustain the Eleventh Amendment and *Ex parte Young* rulings of the court of appeals in the *Seminole Tribe* case, the Court could then either deny the petition in No. 94-35 and the cross-petitions in Nos. 94-189 and 94-219, or otherwise dispose of the petition and

cross-petitions as appropriate in light of its decision in *Seminole Tribe*.

CONCLUSION

The petition for a writ of certiorari in No. 94-12 should be granted. The petition for a writ of certiorari in No. 94-35 and the cross-petitions for writs of certiorari in Nos. 94-189 and 94-219 should be held and disposed of as appropriate in light of the Court's decision in No. 94-12.

Respectfully submitted.

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JANUARY 1995